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In The

Supreme Court of the United States

KLAMATH TRIBES OF OREGON; JOSEPH HOBBS; ROBERT ANDERSON; JOSEPH KIRK; ORIN KIRK; LEONARD NORRIS JR.; PHILLIP TUPPER; ROBERT BOJORCAS; KLAMATH CLAIMS COMMITTEE: CATHERINE WEISER-GONZALEZ; MILLER ANDERSON,

Petitioners,

v.

PACIFICORP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL H. ISRAEL
1315 Bear Mountain Drive
Boulder, Colo 80305
303-246-9027

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Court on multiple occasions has ordered equitable relief, based upon an implied right of action, to preserve the exercise of Northwest Indian treaty fishing at hundreds of off reservation "usual and accustomed stations." Should a right of action at law for damages against a private dam builder be recognized as the preferred remedy for the one Northwest treaty which (a) forbids treaty Indians from leaving their reservation to protect their exclusively on reservation fishing right from downstream interference and (b) granted control over the only means of salmon passage to non Indian pioneers?

LIST OF PARTIES

Plaintiffs-Appellants are the Klamath Tribes of Oregon, a federally recognized Indian tribe, the Klamath Claims Commission, a federally sanctioned tribal entity and Tribal members Joseph Hobbs; Robert Anderson; Joseph Kirk; Orin Kirk; Leonard Norris Jr.; Phillip Tupper; Robert Bojorcas; Catherine Weiser-Gonzalez; and Miller Anderson.

Defendant-Respondent is PacifiCorp, an Oregon corporation doing business in Oregon and California and other states.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Klamath Tribes *et al.* is a federally recognized Indian tribe, has no parent and there are no publicly held companies that hold any stock of the petitioners.

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PETITION

The Klamath Tribe, the Klamath Claims Commission and individual tribal members respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Oregon is reproduced in Appendix C. The unreported opinion of the United States Court of Appeals for the Ninth Circuit is reported at Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTORY AND TREATY PROVISIONS

1954 Klamath Termination Act, 25 USC 564 *et seq.*

1986 Klamath Restoration Act, 25 USC 566 *et seq.*

The Treaty of October 14, 1864, 16 stat. 707.

STATEMENT OF THE CASE

A. Introduction

Consistent with the Supreme Court Rule 10(c), the Klamath Tribes *et al.* demonstrate that their petition should be granted, for the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Moreover, its ruling does not constitute the misapplication of a properly stated rule of law.

The Ninth Circuit's one sentence ruling ignores the Court's well documented analysis for determining when a right of action for damages may be implied where "rights creating" federal directives are violated by "deliberate indifference," resulting in "less favorable treatment." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005). Here, the federal enactment is the Treaty of October 14, 1864, 16 stat. 707, ratified July 2, 1866. By its express terms, non Indian pioneers were to occupy the southern 90% of the Klamaths' historic domain. The Indians were to vacate their historic roaming and fishing and remain within the northern 10% of their territory. In exchange, the Klamaths' undisputed reliance on salmon fishing was "preserved." The Indians and pioneers each understood that the promise that Klamath fishing would be "preserved" required continuing passage of salmon in the Klamath drainage.

This Petition asks the Court to confirm an implied right of action for damages as it relates to the

successor of the entity which knowingly and deliberately elected to block salmon passage and generate electricity for the growing pioneers. That private entity knew that its profits would far exceed the damages incurred by the Klamaths. Beginning in 1916, the company constructed the first of several dams on the Klamath River – the sole passage way for Klamath treaty salmon. No consent of the Klamaths or of the United States was secured. To the contrary, the dam builder represented it would keep salmon coming and/or "assume liability" to keep the Klamath Indians whole.

The 1864 treaty "bargain" is spelled out unambiguously in Art. 1 of the 1864 treaty. The Indians were required to cede to the United States and non Indian pioneers millions of acres of down river terrain and move north to the headwaters of the Klamath River and remain there with the express commitment that "the exclusive right to fish in the rivers arising within the reservation would **be secured**." In exchange, non Indians were to permit passage of salmon in the Klamath River. In the absence of such a commitment the federal rights granted the Indians would disappear and the 1864 agreement would in the words of the Court result in an "impotent outcome." *United States v. Winans*, 198 US 371, 380 (1905). This federal treaty right has been noted by the Court, when subsequently it acknowledged that salmon fishing was then essential to the ability of the Klamath Indians to sustain themselves on their

reduced reservation. *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984).

Equitable relief enjoining the construction of a barrier to salmon passage downstream was not realistic. By the express terms of the 1864 treaty, the Klamaths could not, under threat of federal law, leave their reservation. Arguably any attempt to seek equitable relief would have been resisted on the basis that unlawfully leaving the reservation to police salmon passage downstream would constitute a violation of the equitable maxim that "he who comes into equity must come with clean hands." *Precision Co. v. Automotive Co.*, 324 US 806, 814 (1944). The Indians' only practical form of relief could be the calculation of damages at law – measured once they saw their reservation salmon runs disappear. No ruling of this Court supports the one sentence conclusion of the Ninth Circuit, below, which operates to permit only pre-dam construction injunctive relief as the sole remedy to protect explicitly guaranteed on reservation fishing rights.

As the Klamaths next show, the Court's multiple holdings that once a federal law contains "rights creating language" and there exists no parallel enforcement scheme to protect such rights, damages are the appropriate remedy in the face of evidence of "deliberate indifference", unless they prove inadequate, *Franklin v. Gwinnett County Public Schools*, 503 US 60, 76 (1992).

B. The Present Litigation

In May of 2004, the petitioners filed an action seeking significant historic damages against PacifiCorp as the successor in interest of Copco, the builder in the period 1913-1917 of Copco No. 1 – a dam placed in the bed of the Klamath River just south of the California-Oregon line. The dam is located within the Klamath River drainage which was ceded to the United States and pioneers in 1864. It is undisputed that construction of the dam eliminated the once significant and economically important salmon fishery secured by the Treaty of 1864. As anadromous fish, salmon breed in the upstream reaches of the Klamath River – an area expressly reserved for the sole and exclusive use of the Klamath Indians in their 1864 Treaty. With the construction of Copco No. 1, salmon could no longer pass upstream to the Klamath Reservation and downstream to the Pacific Ocean.

The Klamath Indians further claim that no federal and state statute of limitations prevents the prosecution of their damage action. Finally, the petitioners claim that post treaty developments in the Upper Klamath River, including large irrigation depletions and the changing land ownership, through acts of Congress, may affect the quantity of damages but do not eliminate a cause of action for damages. *See* first amended complaint. KER, pp. 37-38; PCER, pp. 4-12.[1]

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[1] References to PCER are to the PacifiCorps' Excerpts of Record before the Ninth Circuit and KER are to the Klamaths'

(Continued on following page)

On April 14, 2005, Magistrate Cooney of the United States District Court for the District of Oregon entered recommendations finding that the 1954 Klamath Termination Act, 25 USC 564 *et seq.* had made applicable Oregon statutes of limitations to the Klamaths' claims and dismissed the amended complaint on the basis that it was time barred. Upon review, United States District Court Judge Ann Aiken, *sua sponte*, ruled on July 14, 2005 that the Ninth Circuit intervening *en banc* decision in *Skokomish Tribe v. United States,* 410 F.3d 506 (9th Cir.) (en banc) (2005) foreclosed the Klamaths' cause of action. Appendix C.

Skokomish Tribe held that while an equitable claim may be pursued to preserve off reservation treaty fishing, there existed on the face of the 1855 treaty before it no basis for implying damages which might arise from the inundation of one of many off reservation usual and accustomed fishing stations reserved by the Indians for treaty fishing. A timely notice of appeal was filed on October 11, 2005 after the District Court denied a motion filed by the Klamaths under Rule 59(e) to set aside the July order. Appendix B. On February 28, 2008, the Court of Appeals for the Ninth Circuit held in one sentence that its prior holding in *Skokomish Tribe* foreclosed the claim of the Klamaths. Appendix A.

Excerpts of Record before the Ninth Circuit. In addition each party submitted Addendum to their respective briefs, cited here as PC ADD and K ADD.

REASONS FOR GRANTING THE PETITION

A. The Court's past recognition of equitable rights of action against third parties to preserve the federal right to fish in off reservation "usual and accustomed grounds and stations in common with all citizens of the United States" sets the stage for this on Reservation treaty damage action against third parties.

The Ninth Circuit read the Court's past equitable relief decisions – protecting Northwest treaty rights which assured Indians that they could continue to roam and fish at all of their usual and accustomed stations – as foreclosing damages in the setting of a different federal treaty which barred off reservation roaming and fishing and required the Klamaths to fish exclusively on reservation. In our view, the prior Treaty protection cases of this Court are not a bar here.[2] Rather they establish the presence of an implied right of action to protect Treaty fishing rights. Given the unique nature of the Klamaths' Treaty, the Court's long acknowledged right of action to enforce off reservation fishing rights should be recognized here as embracing an award of damages.

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[2] See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658 (1979); *Puyallup Tribe v. Department of Game of Washington*, 391 US 392 (1968); *United States v. Winans*, 198 US 371 (1905); *Seufert Bros. Co. v. United States*, 249 US 194 (1918).

The Court's past cases uniformly uphold equitable remedies associated with such off Reservation treaties – focusing primarily on the obligations of the states to regulate non Indian fishing so as to fully preserve the Indians' fishing opportunity and early on confirming a land servitude on private lands to allow subsequent generations of Indians to retain physical land access to the retained fishing stations.

In *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 US 658, 666, n.9, the Court acknowledged that the ancient right of roaming would be preserved and quoted from Governor Stevens who developed the treaty bargain for Northwest Indians, on behalf of the United States: "We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries." In the District Court litigation leading up to *Fishing Vessel,* the court reiterated the broad and ubiquitous range of reserved "usual and accustomed fishing stations" for a large number of tribes including:

> the Squaxin Island Indians fished for coho, chum, chinook, and sockeye salmon at their usual and accustomed fishing places in the shallow bays, estuaries, inlets and open Sound of Southern Puget Sound and in the freshwater streams and creeks draining into those inlets. Customary use patterns varied according to the types of water areas, with freshwater fisheries being controlled by the

> residents while the deeper saltwater areas were open to anyone who traveled thereon. Their fishing techniques included trolling, stream weirs, spearing and tidal traps. These Indians continued to fish these areas following their relocation on the Squaxin Island Reservation and to rely in part on fishing for subsistence and monetary income. Salmon fishing and the fishing areas used by their predecessor bands continue to be important to members of the Squaxin Tribe.

United States v. Washington, 384 F. Supp. 312, 378 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975).

These court findings flow of course from the plain language of the identical Stevens off reservation Northwest treaties. For example the 1855 Treaty, permitting the Skokomish Indians to continue to roam and fish as they had since time immemorial, expressly protected this right to roam, Art. IV; made it explicit that the small reservation to which they were directed were not permanent, Art. VII, and required the treaty Indians to travel to a central off reservation location where the United States would provide educational, medical and other treaty promised services. Art. XI. PC ADD, pp. 3-5. Each of these provisions confirm that while Indian title to large portions of water and land were ceded, the Northwest Indians retained significant access and control rights throughout their extensive aboriginal domain.

These now familiar to the Court treaty provisions set forth duties and rights which as noted above are fundamentally different from the duties and rights

established in the Klamaths' treaty of 1864. Because the federal rights established at Klamath are different, the character of the implied right to protect the treaty fishing is different. The protection of undefined roaming rights surely does not support damages – for with multiple fishing locations it would be impossible to determine the numbers of Indians who are derived of fishing or indeed the number of fish that might be reliably calculated as being lost to treaty beneficiaries. **No such inadequacy of damage calculations is present where there exists only one drainage and where there exists only one geographic location where Treaty fishing can be exercised.**

The decision in *Skokomish Tribe* properly acknowledged that under the Court's precedent, in the setting of hundreds of off reservation "usual and accustomed fishing stations", only equitable relief was contemplated to protect the treaty fishing rights secured for the Tribes and their members. The Ninth Circuit found no implied right to a damage remedy as against third parties:

> The Supreme Court has held that the Treaty of Point No Point and similar treaties are "self-enforcing" and thus do not require implementing legislation to form the basis of a lawsuit. . . . To make this determination, the Court looked at language common to the treaties, which stated that the treaties "shall be obligatory on the contracting parties as soon as [they are] ratified by the President and the Senate of the United States." Id. . . . . However, the City [of Tacoma] and TPU

> [Tacoma Public Utilities] are not contracting parties to the Treaty. *Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party.* Cf. *Alexander v. Sandoval*, 532 US 275 (2001) . . . ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") *Skokomish Tribe*, at 513 (emphasis supplied).

The Klamath Indians agree with these findings of the Ninth Circuit. The Ninth Circuit conclusion is required by the very bargain established in the Northwest treaties – that Indians reserved to this day the right to roam and fish throughout their aboriginal domain. Unlike the Klamaths' federal rights, no one river was required for the Skokomish Indians to secure salmon passage. No one fish passage corridor was to remain open in exchange for the Indians surrendering their aboriginal domain and permitting the white pioneers to settle free of attack. To the contrary, as noted above, the typical Northwest Indians were free to roam as they had since time immemorial. "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." Art. IV, 12 Stat. 933, 934 KER, p. 2.

The Klamaths next show that in the setting of the 1864 on reservation treaty fishing rights established for the Klamath Indians, there does exist in the language and the structure of the treaty "rights creating language "which supports a claim for damages against a non-contracting party.[3] At Klamath, white pioneers, who benefited greatly from the Klamath Indians' renunciation of their aboriginal domain, were necessarily bound to protect salmon passage on the one river which supplied the all important salmon upon which the Klamath treaty was based.

B. The 1864 Klamath Treaty is structured to support a claim for damages – not claims for equitable relief.

PacifiCorp and the lower courts acknowledge that the geographically specific federal fishing right established in the 1864 Klamath treaty established "rights creating language" for which equitable protection exists. That is, no party informs the Court that the Klamath Indians bargained for and received a

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[3] As the Court has noted in its implied right of action cases, rights creating language which is the foundation for an implied right of action is to be distinguished from a congressional plan where Congress merely prohibits certain activity, finding the latter "states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. *California v. Sierra Club*, 451 US 287, 289 (1980). The Klamath treaty contains a rights creating agreement. No proscription against salmon passage interference was specifically established.

federal treaty right with no implied enforcement. Rather, it is claimed that the Klamaths, having bargained in 1864 for a fundamentally different federal right than the multiple 1855 off reservation fishing treaties, are forever limited to only equitable relief, regardless of the specific federal rights created.[4]

On its face, the Treaty, operating with the force of federal law, separated forever the Indians from their former roaming grounds which were located south on the Klamath River into California, restricted them to upstream on Reservation treaty fishing only, and limited their practical ability to protect their treaty rights utilizing equitable remedies. The Treaty on its face and as expressly understood by all parties, provided the following bargain. In exchange for immediately moving on a permanent basis to a confined Reservation, the Klamaths were "secured" exclusive fishing in that small portion of their original domain identified in the 1864 treaty. Essential to "securing" for the Indians their traditional salmon fishing, the United States and newly arriving

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[4] This conclusion is at odds with the Court's longstanding treatment of implied rights and damages: " . . . it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provide an adequate remedy, and if not whether equitable relief would be appropriate. . . . Moreover, in this case the equitable remedies. . . . are clearly inadequate. . . . prospective relief accords her no remedy at all". *Franklin v. Gwinnett County Public Schools*, 503 US at 76.

pioneers assumed the obligation of protecting salmon passage in the only drainage passing into the Reservation – the Klamath River.

> The tribes of Indians aforesaid cede to the United States[and its pioneers] *all their right, title, and claim to all the country claimed by them*, the same being determined by following boundaries, to wit . . . thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of . . .
>
> That the following described tract, *within the country ceded by this treaty*, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians[and] held and regarded as an Indian reservation, . . .
>
> And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, *they will remove to said reservation and remain thereon*,. . . .; *and the exclusive right of taking fish in the streams and lakes, included in said reservation,* and of gathering edible roots, seeds and berries within its limits, *is hereby secured* to the Indians aforesaid. Art. I, 16 Stat. 708; KER, p. 32 (emphasis supplied).

The Indians, the United States and the pioneers all knew the southern boundary of the ceded lands – the *ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said dividing ridge in an easterly direction to the southern end of Goose* – embraced large portions of the Klamath River south of the smaller reservation located on the northern portion of the lands described in the treaty as "the country claimed by them." While this geographic bargain may not have been fully understood by pioneers located all the way to the mouth of the Klamath River in California, it was surely understood by then present and future pioneers in southern Oregon and northern California where Copco No. 1 was constructed **within the area ceded.**

The federal plan to have the Klamath Indians – unlike other Northwest Indians – give up their aboriginal roaming and fishing practices on condition that they retain anadromous and non anadromous fishing at the headwaters of the Klamath River followed directly from the unusually hostile pretreaty conflicts between Indians and settlers.

> [t]he advantage of a state of peace over a state of harassing war would be of vast advantage to the pioneers who are endeavoring to develop that country, and will advance the interest of both the settlers and the government many times the amount of the appropriation. Superintendent of Indian Affairs,

> March 5, 1864. Klamaths' Opening Brief, Addendum, p. 6.
>
> If a law could be enacted requiring the Indians to remain upon the reservation and providing for their punishment (by withholding annuities or otherwise) if they absent themselves without the consent of the agent and making it an offence for a white person to entice an Indian to leave, or to conceal or harbor him. . . ., its effect would be most salutary. . . . Superintendent of Indian Affairs, Sept. 26, 1864. *Id.* at p. 8.

Once understood, the rights and responsibilities imposed on the Klamaths and the pioneers preserved treaty fishing in exchange for removing to a reservation at the headwaters of the Klamath drainage. The "advantage" secured by pioneers of ridding their lands of hostile Klamaths was balanced by the "advantage" provided the Klamaths to have their Klamath River anadromous fishing corridor preserved. The Court in *Klamath Tribes v. Oregon Department of Fish*, 473 US 753, 761 (1984) cited to a stipulation in that litigation which confirmed that 1864 Treaty fishing had been "crucial to their survival during the years 1864, 1900 and 1906." In addition the record before the Court here – relied upon by both parties – shows a pre-treaty white explorer writing on May 6, 1846 upon arriving at Klamath Lake; "This is a great fishing station for the Indians. . . . Up this river the salmon crowd in great numbers to the lake, which is more than four thousand feet above the sea." Then post treaty, the

Klamath Falls Republican in 1901 reported: "Enormous droves of fish can be seen in the rivers and creeks throughout the county. Mullets, rainbow trout and salmon – splendid fish giants of their size and apparently anxious to be caught. This phenomenon will last a month, and until their egg-laying camp meeting is over with." Klamaths Opening Brief, Addendum, p. 3A and p. 18.

Moreover, the Ninth Circuit over thirty years ago confirmed that in the Klamaths' Treaty "the Government and the Tribe intended to reserve a quantity of water flowing through the Reservation. . . . for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands." *United States v. Adair,* 723 F.2d 1394, 1410 (9th Cir. 1983), *cert. denied*, 467 US 1252 (1984). The undisputed historic record before the Court therefore confirms that the heart of the 1864 Treaty was the commitment by the United States on its behalf and on behalf of its citizens that the Klamaths would retain the right to fish for salmon on their reduced Reservation.

Neither the Court of Appeals nor the District Court felt free to explore the rights and responsibilities placed in the 1864 Treaty, given the *en banc* decision in *Skokomish Tribe*. Because this Court is not restrained by the Ninth Circuit analysis and has had a longer and more in depth history in dealing with the legal issues raised in the Klamaths' damages action, the Klamaths request this Court to consider their claims on the merits.

C. The Klamaths' ongoing right to have third parties preserve their ceded area's only salmon passage corridor – secured by the boundaries set forth in the treaty, the common knowledge of anadromous fish passage and the on reservation fishing limitation imposed by the treaty – was explicitly acknowledged twice by PacifiCorp's dam building predecessor.

PacifiCorp agrees that the 1864 Treaty secures a different treaty fishing right than those reserved by all other major Northwest treaties. But they informed the lower courts that the Klamaths may protect their acknowledged federal right through injunctive relief against non treaty signatories and damages only against the United States, when Congress so consents.

PacifiCorp is falsely riding the injunctive relief precedent which arose solely out of off reservation fishing disputes involving state regulation or land access to the omniscient fishing locations. Their effort to contend that the past recognition of equitable remedies operates to foreclose damages at law flies in the face of the Court's most recent implied right of action analysis which confirm a right to damages when a protected class is found to have been subjected to "less favorable treatment" through "deliberate indifference." *Jackson v. Birmingham Bd. of Ed.*, 544 US 167, 174 (2005).

Second, PacifiCorp's claim that only equitable relief is available is, of course, 180 degrees different

what its predecessor told the Indians twice, once in 1916 and then again in 1917. Thus in 1916, PacifiCorp's predecessor told the United States as it was constructing Copco No. 1 in the bed of the Klamath River, that the dam being constructed would preserve the passage of salmon to the upstream Klamath Reservation;

> We note that complaints have reached your office through the Klamath Indian Reservation that the run of salmon in the Klamath River has been interfered with by a dam which our company has under construction upon the Klamath River.
>
> In . . . reply we beg to say that we expect that the said dam will be completed by the end of the present year, 1916. Ample provision has been made in the plans for the dam for a fish ladder which will permit unobstructed passage of fish up the Klamath River.

In August 1918, the Assistant Commissioner of Indian Affairs sought assurances that the Klamaths' treaty rights to salmon would in fact be honored.

> This will refer further to the Copco dam being constructed on the Klamath River by the California-Oregon Power Company and the desirability of having installed in connection therewith a fishway to permit salmon to reach the upper waters of the river. . . .
>
> *The Indians of the Klamath Reservation have, from time immemorial, depended upon the supply of fish for a large percentage of*

> *their food and it is highly desirable that proper provision be made by the power company for the passage of salmon over its dam.*
>
> The office feels that the shutting off of the salmon run in the Klamath River was a result of the construction of the dam in question, is an imposition on the Indians who depended upon it in the past and would like to have your cooperation in the matter of requiring the company to build a proper fishway as originally contemplated. (emphasis supplied)

PC ADD. pp. 116-117.

Then a year later in 1917, when the very same power company Copco constructed with the United States Bureau of Reclamation, the Link Dam – 60 miles further north – at the foot of the Upper Klamath Lake – the United States required Copco and Copco agreed as an express condition to initiating construction, to pay damages to the Klamath Indians if their second dam inflicted harm on "property or rights", which on its face includes federal treaty protections.

> *The company assumes any and all liability for damage to the property or rights* of any person or corporation or the property or rights of the State of Oregon *or of the Indians due to the operations of said dam by said Company* or to the regulation and control of the levels of said lake by said Company and hereby undertakes to hold the United States harmless from any and all liability for

> damage due to such regulation and control. Par. 7 (emphasis supplied)

KER, p. 38. The entire 1917 agreement was lodged with the Ninth Circuit. The agreement remains in force.[5]

These two commitments by Copco reflect the understanding of the non Indians who benefited by the removal of the Klamaths to their head waters reservation that Klamath on reservation treaty rights – required ongoing fish passage. Notwithstanding Copco's multiple acknowledgements of its obligation to protect salmon passage, Copco remained "consciously indifferent" to its destruction of the treaty fishing rights "secured" by the treaty of 1864. Given the central role which salmon played at treaty, it is inconceivable that the Indians would have agreed to

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[5] Copco's second written commitment to make the Klamath Indians' treaty fishing whole confirms the widely understood bargain placed in the 1864 treaty that pioneers as well as the United States were to protect the Klamaths' exclusively on reservation fishing rights. The commitment further shows that the protection recognized post dam damages and not merely pre-dam injunctive relief. Finally, because the United States required the payment of damages, the requirement sets forth an understanding that the treaty had indeed included the rights creating language which the Court requires to find an implied right of action for damages in the face of deliberate and/or consciously indifferent violations. While no claim for loss of salmon is claimed for the construction of this second dam – for the year earlier construction of Copco No. 1 had already blocked treaty protected fish passage – Copco's second representation to the Klamaths is nevertheless further indication of the presence of an implied right of action for damages.

stay on their diminished reservation in the absence of assurances of continued fish passage. Accordingly, the rights establishing provisions in the Treaty and the structure of the federal bargain with the Klamaths give rise to a claim for damages. As this Court has directed, such a conclusion follows from an examination of what Congress would had inserted, had a remedy "been included in an express provision in the statute." *Gerber v. Lago Vista Independent School District*, 524 US 274, 285 (1998).

D. Neither the passage of time nor the changed circumstances of the Klamath Reservation operate to sidetrack the Klamaths' request for Court review.

If the Court were to determine that the Klamaths' right of remedy request deserves judicial review, a second issue requires resolution. Is such a right of action for damages barred by either the application of State statute of limitations or laches? PacifiCorp relies upon *South Carolina v. Catawba Indian Tribe*, 476 US 498 (1986) for the proposition that when a Tribe – like the Klamath Tribe – is terminated, 25 USC 564 *et seq.*, state statute limitations are triggered to bar this claim. But of course, the Court in *Catawba Indian Tribe*, 476 US at 509, n. 20 (1986) expressly distinguished its finding in that case from the preservation of hunting and fishing rights secured by treaty associated with another terminated tribe, the Menominee Tribe. *Menominee Tribe v. United States*, 391 US 404 (1968).

And subsequently in cases not challenged by PacifiCorp, the Ninth Circuit applied the treaty analysis and a separate Congressional protection for treaty rights applicable to the Wisconsin Menominee and the Oregon Klamaths, but not the South Carolina Catawbas, 18 USC 1162, to carve out from termination Klamath Treaty fishing and hunting rights. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 US 1019 (1974) and *Kimball v. Callahan II*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 US 826 (1979). Accordingly, there exists considerable doubt that the Court would apply state statute of limitations to a federal common law claim focusing on the injury to expressly protected treaty fishing rights.

Apart from the *Catawba Tribe* and *Menominee Tribe* analysis, is the application of the Court's retroactivity precedent as it relates to the possible application of state statutes of limitations to the Klamaths' damage claim. *Landgraf v. USI Film Products*, 511 US 244, 265 (1994) directs the analysis to the 1986 Klamath Restoration Act, 25 USC 566 *et seq.* where Congress provided that any provision of the 1954 Klamath Termination Act, 25 USC 564 *et seq.* "shall be inapplicable to the Tribe and the members of the Tribe after the date of the enactment of this Act." 25 USC 566(B). Accordingly if the Klamath Termination Act were to be read – as urged by PacifiCorp – as identical to the Catawba Termination Act with the result that state statutes of limitations would apply to eliminate the Klamath's damage claims here,

Congress directive in 566(B), enacted in 1986 would change that outcome.

Under *Landgraf,* the directive in the 1986 restoration act that any provision in the termination act "shall be inapplicable" to the Tribe and its members after the 1986 enactment date constitutes what the Court described as language of Congress "which expressly preserves the statute's proper reach." 511 US at 280.[6] Under this analysis then, the Klamaths' 2004 damage action would be free of the bar of state statutes of limitations. The Klamaths' common law nuisance claim would be pursued under federal common law principles which impose no statute of limitations. *County of Oneida v. Oneida Indian Nation,* 470 US 226, 240 (1985).

In like fashion, the Court's recent reliance on laches in *City of Sherrill v. Oneida Indian Nation of NY,* 544 US 197, 217-219 (2005) is not applicable here. Noting that the laches defense is "not a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties", the Court would not permit a belated assertion of a "right to present and future sovereign control over territory. . . , finding that longstanding observances and settled expectations are prime considerations." 511

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[6] This analysis was adopted by the Federal District Court below. Appendix C. App. 16-17.

US at 218. Here, in contrast, no change in the relations of property or the parties can seriously be alleged or proven. Copco and now PacifiCorp continues to block salmon passage and continues to make millions of dollars through hydropower generation. Accordingly while the passage of time does increase the amount of the Klamaths' damages, those damages are modest indeed when compared to the profits enjoyed by PacifiCorp generating hydropower each year since 1917.

Finally, the decision to review this appeal should not be influenced by the multiple so-called defenses which PacifiCorp has offered below. Thus licensing of Copco No. 1 under the Federal Power Act, 16 USC 791a *et seq.* in the 1950's plays no role in this damage claim which is premised on a 1917 destruction of the Klamaths' salmon fishery. Similarly, the fact that congressional termination in the 1950's reduced the concentration of Klamath fishermen and that transfer of much of the Klamaths' 1864 reduced reservation to the United States Forest Service resulted in Klamath treaty fishing being undertaken side by side with non Indian fishing regulated by the State of Oregon both relate, if at all, to the damage calculation. Such change in circumstances do not and can not eliminate an otherwise identified implied right of action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL H. ISRAEL
1315 Bear Mountain Drive
Boulder, Colo 80305
303-246-9027

May 27, 2008

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KLAMATH TRIBES OF OREGON; JOSEPH HOBBS; REPORT ANDERSON; JOSEPH KIRK; ORIN KIRK; LEONARD NORRIS, JR.; PHILLIP [sic] TUPPER; ROBERT BOJORCAS; KLAMATH CLAIMS COMMITTEE; CATHERINE WEISER-GONZALEZ; MILLER ANDERSON, Plaintiffs-Appellants, v. PACIFICORP, Defendant-Appellee.	No. 05-36010 D.C. No. CV-04-00644-AA MEMORANDUM* (Filed Feb. 28, 2008)

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted February 7, 2008
Portland Oregon

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: RYMER, T.G. NELSON, and PAEZ, Circuit Judges.

The Klamath Tribes of Oregon, the Klamath Claims Committee, and individual members of the Klamath Tribe (collectively the "Tribe") appeal from the district court's grant of summary judgment in favor of PacificCorp. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

The Tribe's cause of action for damages is foreclosed by our prior decision in *Skokomish Indian Tribe v. United States,* 410 F.3d 506 (9th Cir. 2005) (en banc).

AFFIRMED.

PAEZ, Circuit Judge, concurring:

For the reasons explained by Judge Berzon in her dissent on the treaty-based damages claim at issue in *Skokomish Indian Tribe v. United States,* 410 F.3d 506, 522 (9th Cir. 2005) (en banc), I continue to believe that case was wrongly decided. The majority opinion, however, is the law of the circuit, and I am obligated to follow it.

In light of the majority's reasoning in *Skokomish,* I am not persuaded by Appellants' argument that, because the treaty right at issue here is different, *Skokomish* should not control the outcome of this case. There, the Skokomish Indian Tribe sought to maintain an action for damages against the City of

Tacoma and Tacoma Public Utilities for a violation of a provision in the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933, that secured to the Tribe "the right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States." *Id.,* art. 4. The *Skokomish* majority affirmed dismissal of the Tribe's claim, holding that it could find "no basis for implying the right of action for damages that the Tribe seeks to assert." 410 F.3d at 514. In so holding, the majority emphasized that the City and Tacoma Public Utilities were not contracting parties to the Treaty, and that there was not "anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.* at 513.

Here, Appellants seek to maintain an action for damages against PacificCorp for violating a provision in the Treaty with the Klamath, etc., 1864, 16 Stat. 707 (Klamath Treaty), that secured to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in said reservation. . . ." *Id.,* art 1. Although this Treaty provision secures to the Klamath exclusive on-reservation fishing rights, it is not so qualitatively different from the off-reservation fishing rights secured to the Skokomish Tribe that we are free to depart from the majority's holding in *Skokomish.* Further, as in *Skokomish,* there is no language in the Klamath Treaty that would support a claim for damages against a non-contracting private party. I therefore conclude that

Appellants' claim for damages is foreclosed by *Skokomish*.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH TRIBES OF OREGON, MILLER ANDERSON, JOSEPH HOBBS, CATHERINE WEISER-GONZALEZ, ROBERT ANDERSON, JOSEPH KIRK, ORIN KIRK, LEONARD NORRIS, JR., PHILIP TUPPER, ROBERT BOJORCAS, and KLAMATH CLAIMS COMMITTEE, Plaintiffs, v. PACIFICORP, an Oregon corporation, Defendant.	Civ. No. 04-644-CO ORDER

AIKEN, Judge:

Plaintiffs filed suit alleging trespass and violations of their fishing rights under the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, Oct. 14, 1864 (Treaty of 1864), 16 Stat. 707. Defendant moved for summary judgment, arguing that the termination of the Klamath Tribe rendered plaintiffs' claims subject to the Oregon statutes of limitations,

and that the limitations period regarding plaintiffs' treaty and trespass claims against defendant or its predecessors expired prior to the restoration of the Tribe's status in 1986.

United States Magistrate Judge Cooney issued his Findings and Recommendation and recommended that defendant's motion for summary judgment be granted. Upon *de novo* review, I agreed that defendant's motion for summary judgment should be granted, finding that the Ninth Circuit's opinion in *Skokomish Indian Tribe v. United States,* 410 F.3d 506, 510, 514 (9th Cir. 2005) (en banc) foreclosed a suit for damages based on the interference with treaty fishing rights brought against third parties. *See* Opinion and Order dated July 13, 2005.

Plaintiffs now move to amend the judgment of the court, arguing that the Treaty of 1864 is distinguishable from the Treaty of Point No Point involved in *Skokomish,* and that the holding of *Skokomish* is not applicable here. Given that the court granted defendant's motion for summary judgment on grounds not raised by the parties, I will consider plaintiffs' motion.

Nevertheless, I do not find plaintiffs' argument persuasive. Plaintiffs argue that a cause of action against third parties for damages is implied under the Treaty of 1865, because its language protects fish passage to former reservation lands as opposed to the right to take fish in common reserved under the Treaty of Point No. Point. *Compare* Treaty of 1864, Article I

(reserving to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in [the] reservation") *with* 1855 Treaty of Point No Point (reserving to the Skokomish Tribe "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United Staten").

As explained in the court's previous order, I do not find that this distinction renders the holding in *Skokomish Indian Tribe* inapplicable to plaintiffs' claim for damages arising from defendant's alleged interference with plaintiffs' treaty right to take fish, Plaintiffs identify no language in the Treaty of 1864 that supports such a cause of action for damages against a third party.

Accordingly, plaintiffs' Motion to Amend Judgement (doc. 76) is DENIED.

IT IS SO ORDERED.

Dated this 20 day of September, 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KLAMATH TRIBES OF OREGON, MILLER ANDERSON, JOSEPH HOBBS, CATHERINE WEISER-GONZALEZ, ROBERT ANDERSON, JOSEPH KIRK, ORIN KIRK, LEONARD NORRIS, JR., PHILIP TUPPER, ROBERT BOJORCAS, and KLAMATH CLAIMS COMMITTEE,

Plaintiffs,

v.

PACIFICORP, an Oregon corporation,

Defendant.

Civ. No. 04-644-CO

OPINION AND ORDER

AIKEN, Judge:

Plaintiffs filed suit alleging trespass and violations of their fishing rights under the Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Bank of Snake Indians, Oct. 14, 1864 (Treaty of 1864), 16 Stat. 707. *See United States v. Adair,* 723 F.2d 1394, 1398 (9th Cir. 1983). On February 10, 2005, defendant moved for

summary judgment, arguing that the termination of the Klamath Tribe, effective 1961, rendered any claim asserted by plaintiffs subject to the Oregon statutes of limitations, and that the limitations period regarding plaintiffs' treaty and trespass claims against defendant or its predecessors expired prior to the restoration of the Tribe's status in 1986.

On April 14, 2005, United States Magistrate Judge Cooney issued his Findings and Recommendation and recommended that defendants' motion for summary judgment be granted. Magistrate Judge Cooney found that the Klamath Termination Act "presents clear congressional intent to redefine the relationship between the Tribe [and the federal government] [and to] remove the special protections previously afforded the Tribe, and this requires the application of the state statute of limitations to the Tribe's claims." Findings and Recommendation, p. 8. Thus, Magistrate Judge Cooney found plaintiffs' claims barred as untimely. The matter is now before me. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the magistrate judge's findings. *See* 28 U.S.C. § 636(b)(1); *McDonnell Douglas Corp. v. Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Plaintiffs filed timely objections to the Findings and Recommendation. I have, therefore, given *de novo* review of Magistrate Judge

Cooney's rulings. I agree that defendant's motion for summary judgment should be granted, although for different reasons than those asserted by defendant.

Plaintiffs do not contest the factual background in the Findings and Recommendation, and I will not repeat it here. Generally, plaintiffs seek damages resulting from the construction and continued operation of dams owned by defendant on the Klamath River. Plaintiffs allege that since 1916, the dams have blocked passage for fish and reduced river flows and water quality, and that the resulting depletion of steelhead and salmon runs interferes with their reserved treaty right to take fish.

Plaintiffs assert two claims for relief against defendant in their First Amended Complaint: one alleging that defendant has "violated the federal treaty rights of the plaintiffs to enjoy Treaty fishing, year to year, subject to varying River flows and appropriate conservation management"; the other alleging that defendant's actions "unlawfully trespass upon and interfere with federal protected property rights of the plaintiffs and their predecessors." First Amended Complaint for Damages, p. 8. Neither party nor Magistrate Judge Cooney distinguished these claims.

While plaintiffs' treaty rights claim is well-established, plaintiffs "federal common law" claim for trespass is questionable based on the facts alleged. Generally, liability for trespass involve "invasions of the interest in the exclusive possession and physical

condition of land." Restatement (Second) of Torts, div. 1, chap. 7, top. 1 (1965) (scope note); *see also id.* § 158. Indeed, relevant cases recognizing federal causes of action sounding in trespass were intended to protect the right of Indian tribes to occupy Indian lands. *See United States v. Pend Oreille Pub. Utility Dist. No. 1,* 28 F.3d 1544, 1549, n.8 ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass, including actions for ejectment, accounting of profits, and damages.") (citing cases).

Here, plaintiffs do not allege that the dams owned by defendant invade or interfere with the use and enjoyment of land possessed by the Tribe. To the extent that plaintiffs' treaty fishing rights support a property interest in former reservations lands, plaintiffs do not allege an invasion of such land so as to interfere with their ability to access these lands and exercise their right to take fish. Rather, plaintiffs allege violations of and interference with their treaty fishing rights caused by the dams' impact on river flows, water quality, and steelhead and salmon runs. *See* First Amended Complaint for Damages, pp. 3-4.

In their objections to the Findings and Recommendation, plaintiffs invoke federal takings law to support their argument that they may assert "federal trespass claims" against a third party for unlawful interference with or destruction of their treaty fishing rights. While plaintiffs' treaty fishing rights are protected property rights subject to compensation for an unlawful taking by the federal government, *see*

Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1513 (W.D. Wash. 1988), the existence of a property interest in treaty fishing rights does not necessarily support a federal common law claim of trespass against a private party where no invasion or interference with the possession, use, or occupancy of land is alleged.

Even if plaintiffs' second claim for relief could be construed as asserting trespass to chattel based on the alleged harm to fish caused by defendant's actions, the scope of plaintiffs' reserved right to take fish is defined by the Treaty of 1864. Restatement (Second) of Torts § 220 (1965) ("One who commits a trespass to a chattel is subject to liability to another who is entitled to the future possession of the chattel for harm thereby caused to such other's interest in the chattel."). Therefore, I construe plaintiffs' second claim for relief as one for interference with their fishing rights reserved by the Treaty of 1864, which is nothing more than the violation of treaty rights alleged in plaintiffs' first claim for relief. The question remains whether plaintiffs' claim seeking damages for violations of their treaty rights is barred by the statute of limitations.

Article I of the Treaty of 1864 reserves to the Klamath Tribe "the exclusive right of taking fish in the streams and lakes, included in [the] reservation." *Kimball v. Callahan,* 590 F.2d 768, 770 (9th Cir. 1979). In 1954, Congress passed the Klamath Termination Act, effective as of 1961. 25 U.S.C. § 564, *et seq.*

> The purpose of the Act was to terminate federal supervision over the trust and restricted property of the Klamath Tribe of Indians, to dispose of federally owned property acquired or withdrawn for the administration of the Indians affairs, and to terminate federal services furnished the Indians because of their status as Indians.

Kimball, 590 F.2d at 770. Further, the Act provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 25 U.S.C. § 564q. The Act, however, expressly stated that "nothing" in the Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." *Id.* § 564m(b). Magistrate Judge Cooney nevertheless found that the language of the Termination Act unambiguously subjected all claims by plaintiffs to the relevant statute of limitations as of 1961, and that the statute of limitations relevant to plaintiffs' treaty claims ran prior to the Klamath Tribe's restoration in 1986.

Plaintiffs object to the Findings and Recommendation, arguing that the Klamath Termination Act did not expressly subject treaty claims to Oregon statutes of limitations, and that any construction of the Klamath Termination Act should be construed in their favor to preclude application of statutes of limitations to treaty rights claims. Plaintiffs rely on *County of Oneida v. Oneida Indian Nation,* 470 U.S.

226 (1985), where the Supreme Court reaffirmed the right of Indian tribes to bring an action under federal common law to enforce or vindicate their "aboriginal land rights." *Id.* at 235. The Oneida Nation had sued to recover damages "representing the fair rental value" of land conveyed to the State of New York in violation of the Trade and Intercourse Act of 1793 (the Non-Intercourse Act) and presently owned by the County. *Id.* at 229. On appeal to the Supreme Court, the County argued that the Oneida Nation's claim for unlawful possession was barred by the relevant state statute of limitations.

The Court noted that "[i]n the absence of a controlling federal limitations period, the general rule is that a state limitations period for an analogous cause of action is borrowed and applied to the federal claim, *provided that the application of the state statute would not be inconsistent with underlying federal policies*." *Id.* at 240 (emphasis added). The Court held that Oneida Nation's federal common law action was not subject to the applicable state statute of limitations, because "the borrowing of a state limitations period in these cases would be inconsistent with federal policy. Indeed on a number of occasions Congress has made this clear with respect to Indian land claims." *Id.* at 241 (emphasis omitted).

Plaintiffs argue that applying the relevant Oregon statute of limitations to their treaty rights is inconsistent with federal law protecting treaty fishing rights from state law interference. *See Menominee Tribe of Indians v. United States,* 391 U.S.

404, 411-12 (1968); *Adair,* 723 F.2d at 1411; *Kimball,* 590 F.2d at 776-77; *Kimball v. Callahan,* 493 F.2d 564, 568-69 (9th Cir. 1974). Plaintiffs emphasize that the Klamath Termination Act explicitly provides that nothing in the Act shall be construed so as to abrogate fishing rights or privileges reserved under the Treaty of 1864. 25 U.S.C. § 564m(b). Thus, plaintiffs argue that application of statutes of limitations to curtail enforcement of their treaty rights constitutes a "back-handed abrogation" of those rights in violation of federal policy.

Defendant, in turn, argues that application of the statutes of limitations does not abrogate plaintiffs' fishing rights but merely requires plaintiffs to assert such rights in a timely manner. Defendant relies on the Supreme Court decision in *South Carolina v. Catawba Indian Tribe, Inc.,* 476 U.S. 498, 500 (1986), where the Court held that the relevant state limitations period applied to the Catawba Tribe's claim for possession of land held by the Tribe prior to the passage of the Non-Intercourse Act. Distinguishing *County of Oneida,* the Court reasoned that the Catawba Act's termination of federal services and protections "represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to 'all other persons or citizens.'" *Catawba Indian Tribe,* 476 U.S. at 508. The Court concluded that "the explicit redefinition of the federal

relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claims." *Id.* at 510-11.

Although *Catawba Indian Tribe* did not involve rights reserved pursuant to treaty, defendant argues that its holding applies with equal force to plaintiffs' claims, because "[t]he Klamath Tribe's federal common law claim is an aboriginal right reserved, not created, by the Treaty of 1864." Defendant's Amended Response to the Klamath Tribe's Objections, p. 6. Even if Oregon statutes of limitations applied to claims of the Klamath Tribe as of its termination in 1961, I find that the intervening congressional act of restoration distinguishes this case from *Catawba Indian Tribe.*

In 1986, tribal status was restored to the Klamath through the Klamath Indian Tribe Restoration Act. 25 U.S.C. § 566, Pub. L. 99-398 (August 27, 1986, 100 Stat. 849). It explicitly provides:

> All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement or statute, or any other Federal authority, which may have been diminished or lost under the [Klamath Termination Act] approved August 13, 1954 (25 U.S.C. 564 et seq.) *are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of*

> *the tribe after the date of the enactment of this Act.*

Id. § 566(b). In contrast to *Catawba Indian Tribe,* the Klamath Indian Tribe Restoration Act not only restores federal services and protections to the Klamath Tribe, it explicitly "restored" all treaty rights that were "diminished or lost" under the Klamath Termination Act. Given that "'canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians,'" the court must construe the Restoration Act "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985) (quoting *County of Oneida,* 470 U.S. at 247). If construed in favor of the Klamath Tribe, the Restoration Act arguably restores the right of the Tribe to enforce its treaty fishing rights if extinguished by virtue of Oregon statutes of limitations rendered applicable under the Klamath Termination Act.

Nonetheless, a recent Ninth Circuit opinion forecloses plaintiffs' right to file suit for damages based on the interference with their treaty fishing rights. In *Skokomish Indian Tribe v. United States,* 410 F.3d 506 (9th Cir. 2005) (en banc), the Skokomish Tribe brought suit against the United States, the City of Tacoma, and the Tacoma Public Utilities (TPU) seeking damages resulting from the impacts of a hydroelectric project on tribal lands and fisheries. *Id.* at 509-10. The Skokomish Tribe alleged that actions

of the City and the TPU violated the Tribe's fishing rights under the Treaty of Point No Point, which reserved to the Skokomish Tribe "[t]he right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the United States." *Id.* at 510.

The Ninth Circuit, sitting *en banc,* held that although a treaty may "provide rights of action for equitable relief against non-contracting parties," the Treaty of Point No Point did not provide a cause of action for *damages* against a non-party to a treaty based on alleged treaty violations. *Id.* at 512. The court noted that although the Treaty of Point No Point and similar treaties are generally "'self-enforcing' and thus do not require implementing legislation to form the basis of a lawsuit," the treaties by their terms "shall be obligatory on the *contracting parties*." *Id.* at 513. "However the City and TPU are not contracting parties to the Treaty. Nor is there anything in the language of the Treaty that would support a claim for damages against a non-contracting party." *Id.*

The Ninth Circuit distinguished several cases suggesting a contrary result, including *County of Oneida,* where the Oneida Nation was allowed to seek damages for the unlawful possession of its land. *Skokomish Indian Tribe,* 410 F.3d 513-14. The court explained that the decision in *County of Oneida* "was not based on any treaty. Rather, it was based on well-established federal common law principles regarding aboriginal possessory rights in land. By contrast, the

Tribe in our case is seeking to collect damages for violation of fishing rights reserved to it by treaty." *Skokomish Indian Tribe*, 410 F.3d at 514. Thus, "there is no basis for implying the right of action for damages that the Tribe seeks to assert." *Id.* at 514.[1]

Here, plaintiffs do not seek prospective relief regarding the alleged interference with their treaty fishing rights. Rather, they seek damages of over $1 billion for violations of those rights. Further, the Treaty of 1864, like the Treaty of Point No Point, states that the Treaty "shall bind the contracting parties whenever the same is ratified by the Senate and the President of the United States," *see* Declaration of David A. Bledsoe, Ex. 3, p. 5, and neither Pacificorp nor its predecessors were contracting parties to the Treaty of 1864.

Finally, the reservation of fishing rights under the Treaty of 1864 does not materially differ from that of the Treaty of Point No Point. Both treaties reserve the right to take fish, albeit the Klamath's right is within (former) reservation lands while the Skokomish's right is in common with non-Indians at their "usual and accustomed grounds and stations." I do not find that this distinction renders the holding in *Skokomish Indian Tribe* inapplicable to plaintiffs'

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[1] Regardless of the soundness of these distinctions, *see* 410 F.3d at 523-27 (Berzon, J., dissenting), *Skokomish Indian Tribe* is Ninth Circuit precedent that this court is obligated to follow.

claim for damages arising from interference with plaintiffs' treaty right to take fish.

Accordingly, Magistrate Judge Cooney's Recommendation is ADOPTED, although I decline to adopt the findings supporting the recommendation. Defendant's Motion for Summary Judgment (doc. 36) is GRANTED, and plaintiffs' motion for partial summary judgment (doc. 57) is DENIED as moot.

IT IS SO ORDERED.

Dated this 13 day of July, 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge

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No. 07-1492

FILED

JUN 30 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KLAMATH TRIBES OF OREGON, *et al.*,
Petitioners,

v.

PACIFICORP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT PACIFICORP'S BRIEF IN OPPOSITION

CHARLES G. CURTIS, JR. *
HELLER EHRMAN LLP
One East Main St.,
Suite 201
Madison, Wisconsin 53703
(608) 663-7460

MICHAEL MIRANDE
1028 32nd Ave. East
Seattle, Washington 98112
(206) 328-8499

JOSEPH H. FAGAN
HELLER EHRMAN LLP
1717 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 912-2162

* *Counsel of Record*

Attorneys for Respondent PacifiCorp

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

PacifiCorp is the corporate successor to private companies that built and operated the Copco No. 1 dam on the Klamath River in California beginning nearly a century ago. The State of California determined while the dam was under construction that it would be "impracticable" for anadromous fish to pass over or around the dam, and ordered the private owners to undertake various mitigation measures "in lieu of" fish passage. The Federal Power Commission and its successor, the Federal Energy Regulatory Commission, subsequently embraced this approach and have licensed the blockage of fish passage by this dam for over half a century. In these circumstances:

1. Do the Klamath Tribes of Oregon have an action under federal common law, or implied under the Treaty of October 14, 1864, 16 Stat. 707, to recover compensatory and punitive tort damages against private parties for the actions of earlier generations that were regulated, authorized, and acquiesced in by the federal and state governments, on the theory that the private parties' predecessors were "deliberately indifferent" to the Klamath's treaty fishing rights?

2. Are the Klamath "the one Northwest treaty" tribe entitled to a "unique" and "fundamentally different" system of treaty remedies, in the words of their Petition?

3. If the Klamath once had a special damages claim against private parties for the blockage of fish passage by Copco No. 1, is that claim now barred under controlling statutes of limitations pursuant to *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

PacifiCorp's common stock is held by PPW Holdings LLC, a subsidiary of MidAmerican Energy Holdings Company ["MidAmerican"]. MidAmerican controls the significant majority of PacifiCorp's voting securities, which also include preferred stock held by unrelated third parties. No other publicly held company owns 10% or more of PacifiCorp's stock. MidAmerican, a global energy company based in Des Moines, Iowa, is a majority-owned subsidiary of Berkshire Hathaway Inc.

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IN THE

Supreme Court of the United States

No. 07-1492

KLAMATH TRIBES OF OREGON, *et al.*,
Petitioners,

v.

PACIFICORP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT PACIFICORP'S BRIEF IN OPPOSITION

The respondent PacifiCorp, by its undersigned counsel, respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit for review of the judgment in *Klamath Tribes of Oregon, et al. v. PacifiCorp*, No. 05-36010 (CA9 Feb. 28, 2008) (Pet. App. 1-4).

OPINIONS BELOW

The Klamath's Appendix omits the Findings and Recommendation of the Magistrate Judge, reprinted as Appendix A to this Opposition (1a-11a). The District Court adopted the Recommendation on other grounds. Pet. App. 17-20.

TREATY, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

Relevant excerpts of the key treaty, statutory, and administrative provisions are included as Appendices B through G to this Opposition (12a-34a), and are identified in the Table of Contents to this Opposition.

COUNTERSTATEMENT OF THE CASE

This case involves an effort by Native American tribes to impose monetary liability on the private sector for the acts of prior generations that were regulated, approved, and encouraged by the federal and state governments. The Klamath seek "in excess of $ 1 billion dollars" in "compensatory and punitive tort damages and interest" from PacifiCorp, as successor to Copco, for "intentionally and deliberately" depriving the Klamath Indians of their treaty-guaranteed right to fish anadromous fish by constructing government-authorized dams on the Klamath River beginning in 1911. First Amended Compl. ["FAC"] ¶¶ 12, 27, and *ad damnum*; *see also* Pet. at 2-3 ("ask[ing] the Court to confirm an implied right of action for damages as it relates to the successor of the entity which knowingly and deliberately elected to block salmon passage and generate electricity for the growing pioneers"). Many of the Klamath's "factual" assertions in support of these claims lack any supporting citations and are riddled with material errors and omissions.

A. The Klamath Tribes and the Federal Government

The Treaty of October 14, 1864, 16 Stat. 707 (App. B at 12a-23a), was structured as a government-to-government "contract[]" between the United States

and the Klamath. Arts. 11-12. The Klamath "acknowledge[d] their dependence upon the government," and the Government assumed a trust responsibility toward the Klamath. Art. 9. The Klamath ceded approximately 22 million acres of their aboriginal territory to the United States, reserving approximately 1.9 million acres as a reservation. Art. 1. The treaty further provided that "the exclusive right of taking fish in the streams and lakes, included in said reservation . . . is hereby secured to the Indians aforesaid[.]" *Id.* This "secured" right did *not* impose a "wilderness servitude" guaranteeing the continued exercise of fishing rights as they "once were exercised by the Tribe in 1864." *United States v. Adair*, 723 F.2d 1394, 1414-15 (CA9 1983). Instead, the 1864 treaty reserves an evolving, adaptive entitlement to the amount of resources "necessary to support [the Klamath's] hunting and fishing rights *as currently exercised* to maintain the livelihood of Tribe members[.]" *Id.* at 1414 (emphasis added).

The Klamath Reservation did not remain static in the decades following the 1864 treaty. A significant portion of the reservation passed out of tribal control and into private ownership during the Allotment Era, and most of the remaining reservation was acquired by non-Indians as a result of the Klamath Termination Act of 1954, ch. 732, 68 Stat. 718 (codified as amended at 25 U.S.C. §§ 564-564x). *See Adair*, 723 F.2d at 1398. "The purpose of the Act was to terminate federal supervision over the trust and restricted property of the Klamath[,] to dispose of federally owned property acquired or withdrawn for the administration of the Indians' affairs, and to terminate federal services furnished the Indians because of their status as Indians." *Kimball v. Callahan*, 590 F.2d 768, 770 (CA9 1979). The

implementation of the Termination Act "essentially extinguished the original Klamath Reservation as a source of tribal property." *Adair,* 723 F.2d at 1398.

Although the Klamath's treaty-reserved water and fishing rights were not extinguished by the Termination Act (*see* 25 U.S.C. § 564m), those rights continued to evolve and adapt as a result of the continued influx of non-Indians onto former reservation lands and into the surrounding Klamath Basin watershed. As a result of these and other changes, the Klamath's modern treaty fishing rights are "somewhat comparable to the off-reservation right 'of taking fish at all usual and accustomed places'" reserved in other Northwest treaties. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 n.15 (1985); *see also Adair,* 723 F.2d at 1415; *Kimball,* 590 F.2d at 774.

The Termination Act took effect in 1961, thereby extinguishing the trust relationship between the United States and the Klamath for a quarter-century until the enactment in 1986 of the Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. 849 (codifed at 25 U.S.C. §§ 566 *et seq*). The Restoration Act re-extended federal recognition to the Klamath and reestablished the trust relationship, subject to vested rights. *Id.* § 566(d).

B. The Regulatory History of the Copco No. 1 Dam

PacifiCorp owns and operates several dams on the Klamath River in Oregon and California, south of the Klamath's former reservation lands. *See* the map at App. H (35a). It is the successor to various owners dating back to Copco (the "California-Oregon Power Company"). Although the Klamath originally sued

with respect to several dams, they have restricted their claims on appeal and in their Petition to a single dam—Copco No. 1.[1]

1. California's Order to Provide Mitigation "In Lieu of" Fish Passage

The Copco No. 1 hydroelectric dam, built in California between 1911 and 1918, is approximately 67 river miles southwest of the Klamath's former reservation in Oregon and 11 river miles south of the Oregon-California border. The Klamath point to a 1916 letter from Copco to the Bureau of Indian Affairs ["BIA"] describing the company's ongoing efforts to provide for continuing fish passage by way of a ladder over the dam, "a tunnel around the dam and in flumes through the base of the dam." *Quoted in* Lane & Lane Associates, *The Copco Dams and the Fisheries of the Klamath Tribe* 150 (1981) ["Lane"] (PADD 116).[2] The Klamath seek to convert this

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[1] The Klamath rely on a 1917 indemnification agreement between Copco and the Bureau of Reclamation pertaining to a *different* dam, the Government-owned Link River Dam, and attempt to twist the language of that agreement into a supposed "further indication of the presence of an implied right of action for damages" against Copco No. 1. Pet. at 21 n.5. The Klamath have waived any claim for damages resulting from the construction and operation of this second dam. *See id.* (disclaiming any damage action *re* the Link River Dam); Klamath CA9 Reply Br. at 9 ("the Link Dam . . . is not involved in this appeal"). Contrary to the Klamath's claim, the 1917 agreement for this *different* dam expired in April 2006 and does not "remain[] in force." Pet. at 21; *see PacifiCorp*, 114 FERC ¶ 61,051, at 27, *reh'g denied*, 115 FERC ¶ 61,075, at 5, 14 (2006).

[2] Citations to "PADD" are to the Addendum to Brief for PacifiCorp filed with the Court of Appeals. Citations to "PSER" are to PacifiCorp's Supplemental Excerpts of Record filed with the Court of Appeals.

letter into a third-party beneficiary agreement in which "Copco publicly assumed responsibility for injury to Klamath treaty fishing" for all time. Klamath CA9 Br. at 29; *see also* Pet. at 18-22.

The letter on its face made no such undertaking. It simply described Copco's ongoing efforts to provide for fish passage during and after the dam's construction. The Klamath also fail to tell the Court what came next. The California Fish and Game Commission undertook a "thorough[]" investigation of Copco No. 1 while it was under construction and determined that fish passage under, around, or over the dam would be "impracticable" and "a waste of time" given a variety of technological and practical obstacles. Lane 153-54, 156-57. The California Legislature enacted a law giving the Fish and Game Commission the authority, where it was "impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam," to order the dam's owner to construct fish hatcheries and other remediation facilities "*in lieu of the fishway*." 1917 Cal. Stats. ch. 749, § 1 (emphasis added) (codified as amended at Cal. Water Code § 5938); *see PP&L v. FPC*, 333 F.2d 689, 694-95 (CA9 1964).

The Commission exercised this authority in 1918, ordering Copco to construct and turn over to the State a fish hatchery at Fall Creek, California, "in lieu of" continued efforts to provide for fish passage. The State ordered Copco to provide additional mitigation facilities during the 1920s. *See* Lane 152-54, 157; *see also PP&L*, 333 F.2d at 690; *PP&L*, 29 FPC 478, 480 (1963).

California and Oregon agreed on an "equitable division" of salmon fingerlings raised in the Fall

Creek hatchery, with half to be transplanted to Klamath Lake in Oregon. Lane 167. "This arrangement . . . continued for some years," and trout fingerlings from the hatchery were also transferred into the Upper Klamath basin. *Id.* These intergovernmental efforts to mitigate impacts to anadromous fish in the Upper Klamath basin appear to have tapered off during the Great Depression, although the state-owned hatchery continued to operate until the late 1940s. *See id.* at 166-68; *PP&L,* 333 F.2d at 690.

The Klamath and their federal trustees were clearly on notice of Copco No. 1's complete blockage of fish passage, and the BIA made occasional inquiries and complaints. It is undisputed, however, that neither the Klamath nor the federal government ever brought suit to stop the blockage of anadromous fish or sought relief from the Federal Power Commission ["FPC"], which was established by Congress in 1920 to deal with precisely these sorts of competing resource demands, or from the FPC's successor, the Federal Energy Regulatory Commission ["FERC"]. *See* pp. 24-29 *infra.* Indeed, the Department of Justice ["DOJ"] repeatedly *rejected* tribal requests to bring suit challenging Copco No. 1's fish blockage during the 1940s and 1950s. Lane 2-3; PSER 30; PADD 82-83. The United States has never deviated from this position. Nor, until recently, has the Executive Branch ever sought to exercise its reserved statutory authority under the Federal Power Act ["FPA"] to "prescrib[e] . . . such fishways" as it deems appropriate past this dam, at the owner's expense. 16 U.S.C. § 811; *see* n.4 *infra.*

2. The Federal Government's Reaffirmation of Mitigation Measures "In Lieu of" Fish Passage

Copco No. 1, along with the other private Klamath River dams, has been comprehensively regulated by the FPC and FERC since the 1950s as part of Klamath Hydroelectric Project No. 2082.[3] Far from condemning the lack of fish passage, the United States continued the practice of ordering the private dam owner to provide fish hatcheries and other mitigation measures "in lieu of" provisions for fish passage. *See, e.g., PP&L,* 29 FPC at 480-85; *see* pp. 25-27 *infra*. The Ninth Circuit emphasized over four decades ago with respect to this same Project that it had "no doubt" that, in exchange for the "privilege" of operating dams that block fish passage, it is "quite proper" to require the licensee to construct fish hatcheries and other mitigation facilities. *PP&L,* 333 F.2d at 693. This has been the governing regulatory framework for hydroelectric development for nearly the past century. *See, e.g., FPC v. Oregon,* 349 U.S. 435, 449-52 (1955) (sustaining FPC's authorization of private dam that cut off passage of anadromous fish where the licensee was required to undertake mitigation measures); *Washington Dep't of Game v. FPC,* 207 F.2d 391, 397-98 (CA9 1953)

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[3] For the complex history of the FPC's assumption and early exercise of regulatory authority over Copco No. 1 and the other Klamath River dams (including the imposition of mitigation measures and the reservation of authority to require further measures for fish passage), *see Copco,* 10 FPC 1561 (1951); *id.,* 13 FPC 1 (1954), *pet. for review dismissed,* 239 F.2d 426 (CADC 1956); *id.,* 15 FPC 14 (1956); *id.,* 18 FPC 364 (1957); *id.,* 23 FPC 59 (1960); *id.,* 25 FPC 579 (1961); *PP&L,* 29 FPC 478 (1963), *on reh'g,* 30 FPC 499 (1963), *aff'd and remanded,* 333 F.2d 689 (CA9 1964).

(same). The FPC and FERC have consistently reserved broad authority in the Project No. 2082 license to require "reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of" the Department of the Interior ["DOI"] or state conservation agencies, including additional "fish facilities," "protective devices," and "fish screens or ladders." *Copco*, 25 FPC at 581 (Art. 49). Neither the Commission nor the DOI has ever sought to invoke its authority to require fish passage—until recently.

FERC is currently conducting relicensing proceedings for Project No. 2082. The Klamath are active parties to those proceedings and have requested that FERC take various actions to change the governing regulatory framework, including with respect to fish passage, habitat restoration, and outright removal ("decommissioning") of the dams. These issues are undergoing intensive evaluation and negotiation, and FERC's relicensing procedures will ensure the input of many federal and state agencies, Indian tribes, and other stakeholders in resolving these issues, subject to special provisions for judicial review. *See* 16 U.S.C. §§ 803(a), 825*l*(a)-(b).[4]

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[4] FERC's relicensing files include numerous submissions by the Klamath and various federal and state agencies addressing fishing and treaty rights issues, a September 2006 ALJ decision addressing various fish-passage feasibility and other environmental issues, and a November 2007 Final Environmental Impact Statement addressing various fish-passage options. The Departments of the Interior and Commerce have announced their intention to invoke their authority under 16 U.S.C. § 811 to require upstream and downstream anadromous fish passage past Copco No. 1, to be implemented over a number of years.

C. The Klamath's Claims Against PacifiCorp

The Klamath admit that, within several years from the start of construction in 1911, "no salmon or steelhead passed upstream and the plaintiffs and their ancestors have been denied salmon and steelhead ever since." FAC ¶ 7. This blockage is alleged to have "contributed to the devastating decline of the Klamath Tribes and their members and led to their temporary termination in the 1950s." *Id.* ¶ 9. The Klamath seek compensatory and punitive tort damages because, among other reasons, of the failure of PacifiCorp and its predecessors "to have inserted necessary fishway facilities in [the FPC's] 1957 license," "to have inserted the necessary fishway facilities" in later amendments to that federal license, and to have met the FPA's "public interest" standards. *Id.* ¶ 12(e)-(h). Although PacifiCorp and its predecessors obviously did not issue their own licenses and regulatory approvals, the Klamath now claim that these private parties were "deliberate[ly]" and "consciously indifferent" to the Klamath's treaty rights and should have ignored their state and federal approvals. Pet. at 2, 18, 21.

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO CERT-WORTHY ISSUES.

The Klamath point to neither a conflict between the decision below and "relevant decisions of this Court," nor to any conflicts among federal or state courts as to the Question Presented. S. Ct. R. 10.

FERC's entire relicensing files appear at http://elibrary.ferc.gov/idmws/docketsearch.asp. To retrieve these files, type "P-2082" in the "Docket Number" box and then submit.

Indeed, they "agree" with the decision below and with other federal decisions that Native American tribes may not generally sue non-treaty parties for damages to the exercise of tribal fishing rights caused by off-reservation dams and other development. Pet. at 11. Instead, "only equitable relief [is] contemplated" against non-parties, together with damages against the United States for having violated its treaty obligations. *Id.* at 8. The Klamath contend, however, that they alone have "a fundamentally different federal right" from any other tribe, that their treaty rights have a "unique nature" and are "unlike [those of] other Northwest Indians," and that theirs is "*the one* Northwest treaty" to authorize damage awards against private parties for off-reservation development that harms tribal fishing rights. *Id.* at i, 7, 9, 13, 15 (emphasis added).

These contentions not only are wrong—*see* Point II *infra*—they are not certworthy. The Klamath assure the Court that they are not arguing that the Ninth Circuit's decision constitutes "the misapplication of a properly stated rule of law" to the circumstances of this case (Pet. at 2, citing this Court's Rule 10), but that is precisely what they contend. In particular, they purport to "agree" with the Ninth Circuit's *en banc* decision in *Skokomish Tribe v. United States*, 410 F.3d 506 (CA9 2005) (*en banc*), *cert. denied*, 546 U.S. 1090 (2006), but to disagree with the panel's application of *Skokomish* to the particular circumstances of this case. Pet. at 11. Theirs is simply a fact-bound plea to correct the panel's supposed misapplication of unchallenged Ninth Circuit law.

Moreover, to the best of counsels' knowledge, every court considering the issue has rejected tribal damage claims against private investor-owned utilities

for government-authorized dams that harm treaty-reserved fishing rights. As one district court has concluded, "[a]ll of the cases and legal authorities cited to the Court, and all of the cases this Court has independently examined, have required mitigation or protection efforts rather than providing for an award of damages" against private parties for off-reservation dams that harm treaty-reserved fishing rights. *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 810 (D. Idaho 1994) (collecting authorities). As another district court has emphasized, "[t]he usual recourse for a tribe that claims the loss of a guaranteed usufructuary right is either to seek monetary compensation for the lost opportunity from Congress, the Court of Claims or the now-defunct Indian Claims Commission or to sue for an injunction preventing the construction of a dam or other obstruction or requiring that it be removed." *Menominee Indian Tribe of Wis. v. Thompson*, 922 F. Supp. 184, 216 (W.D. Wis. 1996) (*re* downstream dams that blocked fish passage to upstream reservation waters), *aff'd*, 161 F.3d 449 (CA7 1998). The Klamath have cited no case to the contrary; there is simply no split of authority on this point. *See also United States v. Washington*, 694 F.2d 1374, 1381 n.15 (CA9 1983) (although governments have an obligation "to take reasonable steps to preserve and enhance" treaty-reserved fishery resources, treaties "do[] not create any independent treaty obligation on the part of private permittees"), *vacated on ripeness grounds*, 759 F.2d 1353 (CA9 1985).

In addition, this is the first time the Klamath have advanced their argument that a damage action should be implied because they are "a protected class" that has "been subjected to 'less favorable treatment' through 'deliberate indifference.'" Pet. at 18 (quoting

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 174 (2005)); *see also* Pet. at 2-4. Although the Klamath made many arguments for implying a damages claim against private parties in their lower court briefs, the "deliberate indifference" theory appears nowhere in those briefs. Nor do those briefs even cite to *Jackson*, the Klamath's lead case for this proposition, which is a Title IX decision having nothing to do with the circumstances or legal framework of this case. The Klamath may not raise their new arguments and theories for the first time in this Court. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001).

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF THE KLAMATH'S DAMAGES ACTION.

The Klamath assert both an implied cause of action for damages under the 1864 treaty and a "common law nuisance claim . . . pursued under federal common law principles" set forth in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ["*Oneida II*"]. *See* Pet. at 24. The Klamath fail to state a claim under either theory.

A. There Is No Justification for Treating the Klamath Differently From All Other Tribes.

The lower courts correctly determined that the 1864 treaty is materially indistinguishable from other Northwest treaties that have been construed as supporting only equitable relief, not damages, against third parties. Pet. App. 2-3 (Paez, J., concurring); *id.* at 6-7, 19-20. The governing authority in the Ninth Circuit—unchallenged by the Klamath

here—holds that a treaty between an Indian tribe and the United States generally does not give rise to a cause of action by the tribe against a third party that did not sign the treaty. The availability of *injunctive* relief against third parties to the treaty does not warrant *damages* relief against them, "let alone monetary damages going back nearly seventy-five years," in the absence of any "language of the Treaty that would support a claim for damages against a non-contracting party." *Skokomish*, 410 F.3d at 513-14.

The Klamath treaty is identical in all material respects to the Skokomish treaty. Both were bilateral government-to-government contracts, structured as "[a]rticles of agreement and convention" between the sovereign "contracting parties." *Compare* App. B at 12a, 18a *with* PADD 3, 5. Article 12 of the 1864 treaty provides that "[t]his treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States"—virtually the same language the Ninth Circuit found so compelling in *Skokomish*. *Compare* App. B at 18a *with* PADD 5; *see* 410 F.3d at 513. Like the municipal defendants in *Skokomish*, PacifiCorp is not a "contracting part[y] to the Treaty." 410 F.3d at 513. Indeed, the case for third-party liability here is much weaker than in *Skokomish* because PacifiCorp is a *private* entity whereas the defendants in *Skokomish* were *governmental* entities tied to the federal government through the Supremacy Clause of the U.S. Constitution. *See* pp. 21-23 *infra*. The point of dissent in *Skokomish* was simply that the United States should not be the only *governmental* entity required to pay damages for treaty rights violations in appropriate circumstances. *See* 410 F.3d at 522,

524-25 n.5, 526 (Berzon, J., dissenting). Private damages liability would be unprecedented.

As with the Skokomish treaty, there also is nothing in the Klamath treaty's language "that would support a claim for damages against a non-contracting party." *Skokomish*, 410 F.3d at 513. The Klamath attempt to distinguish the 1864 treaty by arguing that it promised to "hereby *secure*[] to the Indians" their fishing rights in reservation waters, arguing that the federal government's pledge to "*secure*" the Klamath's fishing rights was "rights-creating language" in which "the United States *and newly arriving pioneers* assumed the obligation of protecting salmon passage[.]" Pet. at 3-4, 12-14 (emphasis added). This reading of the treaty language is untenable, and the purported difference from other treaties is illusory. Article 4 of the Skokomish treaty also pledges to "secure[]" to the Indians their fishing rights—language found in many other Northwest treaties. PADD 4. As in *Skokomish*, the Klamath have failed to produce any evidence that this promise by the United States to "secure" tribal fishing rights was intended by the President and Senate in the 1860s to be enforceable through damage actions against private citizens who have relied on governmental approval and acquiescence.

The Klamath offer several other arguments for why they are entitled to a "fundamentally different" set of treaty remedies than all other tribes. Pet. at 9, 13. These arguments fail on all counts.

(1) Superior treaty rights. The Klamath claim their treaty fishing rights are "unique," "fundamentally different," and "unlike [those of] other Northwest Indians[.]" Pet. at 7, 9, 13, 15. They minimize the significance of other tribes' off-

reservation fishing rights, dismissing them as mere "undefined roaming rights" and rights of "land access to the omniscient [*sic*] fishing locations." *Id.* at 10, 18; *see also id.* at 11 (other treaties merely reserved "the right to roam and fish").

This fundamentally misperceives the nature of off-reservation treaty fishing rights, which are not simply rights of access to fishing places, but of a share of the available fish themselves. *See, e.g., Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 681-82, 685 (1979); *United States v. Oregon,* 718 F.2d 299, 304 n.6 (CA9 1983). The United States promised in all of these treaties to protect the exercise of tribal subsistence and commercial fishing activities central to each tribe. Interference with this entitlement yields the same functional harms in each instance. A dam blocking anadromous fish passage into reservation waters is functionally no different than a dam blocking anadromous fish passage to an off-reservation "usual and accustomed" fishing place. Both interfere with the passage of fish and hence with a tribe's ability to take the fish. The remedy in each instance should be the same, particularly given the materially identical language and structure of these treaties.[5]

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[5] The Klamath argue that this case is different because Copco made various "commitments" and "representation[s]" that its dam would never block fish passage, referring to the 1916 Copco letter to the BIA and the 1917 contract between the United States and Copco for the construction and operation of a *different* dam. Pet. at 3, 18-22. As discussed above, Copco's 1916 statements came prior to California's order that it undertake fishery mitigation measures "in lieu of" further attempts at fish passage. *See* pp. 5-7 *supra.* The indemnification provision in the 1917 Link River Dam contract has no bearing on

(2) Greater deprivation. The Klamath argue that they have suffered much greater losses than the Skokomish and other Northwest tribes because they relied on only "one river" and "one fish passage corridor" to exercise their anadromous fishing rights; the Copco No. 1 dam supposedly blocked "the only means of salmon passage" to the reservation. Pet. at i, 11. The Skokomish and other Northwest tribes, on the other hand, supposedly had "hundreds of off reservation 'usual and accustomed fishing stations'" to choose from, so the loss of fishing opportunities caused by the numerous dams in the Northwest could have caused no damages given the alternative "multiple fishing locations" still available. *Id.* at i, 10.

These claims are unconvincing given that the Northwest treaty off-reservation fishing rights, in common with the Klamath's reserved fishing rights, were "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans,* 198 U.S. 371, 381 (1905). The dams at issue in *Skokomish* were alleged to have created a "diversion [that] destroyed the most significant fish producing stream of the Skokomish River system and its excellent runs of salmon and steelhead." 410 F.3d at 517 n.9 (quotations and citations omitted). This destruction was alleged to have caused the Skokomish "nearly $5 billion in losses," compared with the one billion dollars sought here. *Compare id.* at 510 *with* FAC, *ad damnum*. The harms alleged in this case are no greater in kind or degree than other Northwest treaty fishing cases.

PacifiCorp's liability here for all of the reasons discussed at p. 5 n.1 *supra*.

But even if the Klamath's losses were much greater, this would not justify a "unique" and "fundamentally different" set of remedies than recognized in all other treaty rights cases. Pet. at 7, 9, 13. The relative degree of a particular tribe's fishing losses might strengthen its claim for injunctive relief, or increase the amount of damages it may recover from the sovereign government(s) that authorized the damaging acts. Decisions about the existence of subject matter jurisdiction and the availability of certain remedies, however, cannot turn on value judgments about the importance of the asserted interests, the extent of alleged losses, or the case-specific geographic and hydrologic characteristics of various treaty areas. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408, 429-32 (1989) (opinion of White, J.).

(3) Inability to seek equitable or administrative relief. The Klamath could have sought to protect their treaty fishing rights through federal administrative remedies, injunctive claims against appropriate governmental and private parties, or damage claims against the governmental bodies that authorized the blockage. Numerous other tribes have obtained administrative or judicial relief against dams and other developments that threaten treaty-protected fishing rights. *See, e.g., Northwest Sea Farms v. Army Corp of Engr's*, 931 F. Supp. 1515, 1519-22 (W.D. Wash. 1996); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1509-16 (W.D. Wash. 1988); *Confederated Tribes of the Umatilla Reservation v. Alexander*, 440 F. Supp. 553, 554-56 (D. Or. 1977). Other tribes have recovered damages against the United States for its authorization of dams that blocked the passage of anadromous fish.

See, e.g., Confederated Tribes of the Colville Reservation v. United States, 43 Ind. Cl. Comm'n 505, 539, 542 (1978) (United States was liable to tribe for "ascertainable damages" to treaty fishing rights where federal government authorized construction of dams on the Columbia River that "ended forever the upstream migration and spawning of anadromous fish in the upper Columbia"); *id.* at 534-42, 582-91; *see also Skokomish*, 410 F.3d at 510-11; *Whitefoot v. United States,* 293 F.2d 658, 659-61 (Ct. Cl. 1961).

The Klamath claim, however, that they could not have sought these other remedies because their 1864 treaty "forbids treaty Indians from leaving their reservation to protect their exclusively on reservation fishing right from downstream interference." Pet. at i. They contend that "[a]rguably any attempt to seek equitable relief would have been resisted on the basis that" this constituted "unlawfully leaving the reservation," which "would [have] constitute[d] a violation of the equitable maxim that 'he who comes into equity must come with clean hands.'" *Id.* at 4; *see also id.* at 13 (1864 treaty "limited their practical ability to protect their treaty rights utilizing equitable remedies," because they could not leave the reservation). These arguments are spurious, and there is no evidence that the Klamath were ever denied access to federal agencies or courts that could have addressed their treaty grievances. Indeed, the historical record demonstrates that the Klamath over the past century have complained to the BIA and DOJ, participated in FPC and FERC proceedings, and sought relief from the federal courts on many other fishing rights issues. *See* pp. 3-9 *supra*, pp. 25-27 *infra*. There is no reason for differential treatment.

(4) Inability to quantify damages in other cases. The Klamath also argue that courts have denied damages for violations of off-reservation fishing rights because it would be "impossible" to make the computations required to award damages—"for with multiple fishing locations it would be impossible to determine the numbers of Indians who are derived [*sic*] of fishing or indeed the number of fish that might be reliably calculated as being lost to treaty beneficiaries." Pet. at 10; *see also id.* at 6. Here, on the other hand, "[n]o such inadequacy of damage calculations is present" because "there exists only one drainage and . . . only one geographic location where Treaty fishing can be exercised." *Id.* at 10.

This too is spurious. Neither *Skokomish* nor any other treaty fishing case has denied damages on these grounds, and the takings cases demonstrate that appropriate damages can be ascertained—against the federal government. *See Colville,* 43 Ind. Cl. Comm'n. at 542-50, 592-604 (calculating damages). Moreover, federal courts have decades of experience in measuring, quantifying, and allocating "fair shares" of anadromous fish among competing claimants, including by determining the number of claimants, the quantity of available fish (both naturally bred and hatchery fish, on and off the reservation), and the number of fish required for tribal uses. *See Cohen's Handbook of Federal Indian Law* § 18.04[2][d], at 1132-33 (2005 ed.); *see also Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 686-88. Here again, the availability of damages does not turn on case-specific factors like these.

B. Federal Common Law Prohibits Damage Actions Against Private Parties for Government-Authorized Activities That Interfere With Indian Treaty Rights.

The principle of government (*i.e.*, public) responsibility in lieu of private liability for the consequences of historic wrongdoing against tribes and their members is deeply ingrained in federal Indian law. "If, in carrying out its role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties" who acted in reliance on earlier governmental authorizations and approvals. *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983); *see also id.* at 145 (Brennan, J., concurring) (citizens have the right to "rely on specific promises made to their forebears two and three generations ago" by government officials, but the injured tribe may seek a takings remedy). Courts will not rewrite history and impose liability on private parties who have acted pursuant to several generations of governmental action and inaction, particularly where those parties "have erected buildings of a permanent character" and "development of every type imaginable has been ongoing[.]" *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 219 (2005) (internal quotations and citations omitted). These principles are reflected in the relevant treaty fishing rights cases—as discussed above, *every* case considering the issue has barred tribal damage claims against private parties for fishing losses caused by government-approved dams. *See* pp. 11-12 *supra*.[6]

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[6] *See also United States v. Sioux Nation of Indians*, 448 U.S. 371, 376-84, 408-24 (1980); *Shoshone Tribe v. United States*, 299

The Klamath contend, however, that they have a "common law nuisance claim" for damages pursuant to the reasoning of *Oneida II*. Pet. at 24. As this Court emphasized in *City of Sherrill*, however, *Oneida II* only authorized a damage claim against *government*, not private parties. 544 U.S. at 202, 208-09. The Court quoted approvingly at length from the decision in *Oneida III*, which held on remand from *Oneida II* that "standards of federal Indian law and federal equity practice" prohibit damage claims against *private* parties for the wrongs of prior generations, and that tribal claimants must instead seek damages from the federal and state governments that authorized and acquiesced in private activities that in turn interfered with tribal treaty rights. *City of Sherrill*, 544 U.S. at 209-10, 213-14 (discussing *Oneida Indian Nation of N.Y. State v. County of Oneida*, 199 F.R.D. 61, 88-95 (N.D.N.Y. 2000)). This Court also emphasized in *City of Sherrill* that great weight must be given to private parties' "justifiable expectations" arising out of the long-standing "exercise of regulatory jurisdiction" by state and federal governments, and that the district court in *Oneida III* had "rightly found" that relief

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U.S. 476, 497 (1937); *United States v. Creek Nation*, 295 U.S. 103, 110-11 (1935) (where federal government failed to protect tribal natural resources—"not improbably because of the unhappy situation in which the other course would leave the allottees and settlers"—the United States thereby "appropriated" the tribe's resources and gave "an implied undertaking . . . to make just compensation to the tribe"); *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) (where tribal resources were unlawfully disposed of and the dispositions had stood for several generations, the "restor[ation of] the Indians to their former rights" would be deemed a judicially "impossible" remedy but United States would be liable in damages for the taken resources); *Felix v. Patrick*, 145 U.S. 317, 335 (1892).

should be restricted "where development of every type imaginable has been ongoing" for many generations based on the encouragement and acquiescence of the federal government. 544 U.S. at 215-16, 219. This Court repeatedly noted the "complicit[y]" of the federal government in the alleged violations of the Oneida's treaty rights. *Id.*; *see also id.* at 205 (alleged treaty violations were "known and not objected to by the national government") (quotation marks and citation omitted), 214 ("the United States largely accepted, or was indifferent to," the alleged treaty violations).

The parallels to the federal government's role in this case are striking. Federal officials have known and deliberated about Copco No. 1's blockage of fish passage since the World War I era, and since the 1950s have licensed the very facilities and operations that are challenged here. DOJ considered but rejected bringing a treaty rights claim during the 1940s and 1950s. The Secretaries of Commerce and of the Interior, together with the FPC and FERC, had the statutory power to require fish passage at any time after 1920, but chose not to exercise that power (until the current relicensing proceeding). *See* pp. 7-9 *supra*. Given the federal government's authorization of, "complicit[y]" in, and "indifferen[ce] to" the alleged treaty violations, damage claims are barred against private parties and their successors.[7]

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[7] It is the element of private reliance on government authorizations that distinguishes this case from decisions recognizing that damages may be appropriate in certain circumstances for acts of trespass and other *unauthorized* interferences with federally protected reservation rights. *See, e.g., United States v. Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1546-49 (CA9 1994) (affirming award of trespass damages for flooding of

C. The Klamath's Claim for Damages Is Barred by the Federal Government's Long-Standing, Comprehensive Role in Regulating the Impacts of Hydroelectric Dams on Treaty Fishing Rights.

The Klamath's claims must also be rejected because they would disrupt "a comprehensive regulatory program supervised by an expert administrative agency" and designed by Congress to protect the very same treaty rights in issue here. *Milwaukee v. Illinois,* 451 U.S. 304, 317 (1981) (federal pollution laws displace federal common law of nuisance). Congress enacted the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 (codified as amended at 16 U.S.C. §§ 791a *et seq.*), to serve as "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC,* 328 U.S. 152, 180 (1946); *see also California v. FERC,* 495 U.S. 490, 497-507 (1990). This "complete and comprehensive plan" for accommodating competing demands for navigable waters "neither overlooks nor excludes Indians or lands owned or occupied by them." *FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 118 (1960). The FPA provides a comprehensive regulatory scheme to pro-

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reservation land; FERC license did *not* "authorize the Utility to flood Reservation land"; the utility had known it had no such right, but chose to flood tribal lands anyway); *United States v. S. Pac. Transp. Co.*, 543 F.2d 676, 697-99 (CA9 1976) (affirming railroad's liability for trespass damages where its purported easement from the tribe was obtained without the federal government's authorization; railroad could not obtain immunity through an *invalid* easement).

tect fishery resources in general and Indian treaty rights to those resources in particular, and gives the Klamatn an array of remedies in the event that the Act's requirements or their treaty rights are violated.[8] In addition, in implementing the provisions of the FPA, FERC and other involved federal agencies have a trust responsibility toward the tribes to consider and accommodate their concerns. *See, e.g., Skokomish Indian Tribe v. FERC,* 121 F.3d 1303, 1308 (CA9 1997); *Covelo Indian Cmty. v. FERC,* 895 F.2d 581, 586 (CA9 1990). FERC and the federal courts have repeatedly enforced these statutory and trust duties to protect against and mitigate adverse fishing impacts.[9]

The FPC and FERC have followed these responsibilities in licensing and administering Project No. 2082 for the past half-century. The FPC held hearings in Klamath Falls about Copco No. 1 and the other Klamath River dams during the 1950s, and the Klamath Tribes and federal agencies charged with protecting tribal interests participated in those proceedings. *See, e.g., Copco,* 13 FPC at 2-6; *id.*, 23 FPC at 59-62. Moreover, the FPC and FERC have periodically amended the Project No. 2082 license to require new measures to promote fish passage and provide mitigation for adverse impacts to fishery

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[8] *See, e.g.*, 16 U.S.C. §§ 797(e), 803(a)(2)(B), 803(a)(3), 803(j), 811. On the remedies available to the Klamath, *see, e.g., id.* §§ 823b, 825e-825h, 825*l*-825p.

[9] *See, e.g., Confederated Tribes and Bands of Yakima Indian Nation v. FERC,* 746 F.2d 466, 470-74 (CA9 1984); *California v. FPC,* 345 F.2d 917, 921-30 (CA9 1965); *Nez Perce,* 847 F. Supp. at 816 n. 30; *PUD No. 1 of Douglas Cty., Wash.,* 107 FERC ¶ 61,280, at 62,329-62,331 (2004); *Washington Water Power Co.,* 25 FERC ¶ 61,228 (1983).

resources, based on recommendations from DOI and relevant state commissions. *See, e.g., Copco*, 13 FPC at 10-11; *id.*, 18 FPC at 367-68; *id.*, 23 FPC at 71-73; *id.*, 25 FPC at 581; *PP&L*, 34 FPC 1387, 1391 (1965). The FPC and FERC have also repeatedly reserved the right to impose additional fish passage requirements. *See* p. 9 *supra*. Yet there is no indication that the Klamath, in the 88 years since the FPC was created, did anything other than acquiesce in the FPC's decision not to require passage of anadromous fish at Copco No. 1, prior to the current relicensing proceedings. *See* pp. 8-9 *supra*. Nor is there any indication that any federal agency ever requested the FPC or FERC to intervene on the Klamath's behalf and restore anadromous fish passage all the way to Upper Klamath Lake. Nor have the Secretary of Commerce or Secretary of the Interior ever prescribed a fishway at Copco No. 1 pursuant to 16 U.S.C. § 811 (prior to the current relicensing, *see* p. 9 n.4 *supra*).

Rather, the record shows that the FPC, FERC, DOI, and other federal agencies followed the prevailing regulatory framework and required various mitigation measures "in lieu of" provisions for fish passage. *See* pp. 8-9 *supra*. There is no suggestion that PacifiCorp or any of its predecessors violated any of the Project No. 2082 license conditions (and such allegations would, in any event, need to be directed in the first instance to FERC). Instead, the regulatory record shows that PacifiCorp and its predecessors have followed governing state and federal laws providing for mitigation measures "in lieu of" fish passage, and have relied on these government orders and licenses in carrying out their operations. *See* pp. 8-9 *supra*.

The Klamath argue, however, that because the dam blocked fish passage beginning in World War I, the subsequent enactment of the FPA in 1920 and FPC licensing approvals beginning in the 1950s "play[] no role" in this case, because the FPA allows only "pre-dam construction" relief. Pet. at 4, 25. According to the Klamath, "[t]here is no provision in the Federal Power Act which permits the imposition of a condition . . . to restore an extinguished fishery," and thus no relief has ever been available *other than* damage claims. Klamath CA9 Reply Br. at 23. This argument is specious. Federal courts have repeatedly recognized the Commission's authority to require "restoring migratory fish runs." *Wisconsin Pub. Serv. Corp. v. FERC*, 32 F.3d 1165, 1170 (CA7 1994); *see also American Rivers v. FERC*, 187 F.3d 1007, 1018 (CA9 1999) (authority to require "reduc[tion of] negative impacts attributable to a project since its construction"), *amended on other grounds*, 201 F.3d 1186 (CA9 2000); *California v. FPC*, 345 F.2d at 927 (authority to require "protection of spawning on a scale which would reverse the downward trend in recent years"). That is precisely what the Klamath are asking the Commission to require in the current relicensing proceedings, *see* p. 9 n.4 *supra*, even though here they claim they have no such remedy.

FERC's comprehensive regulatory oversight has several important consequences. *First*, it underscores that a cause of action under federal common law or implied from the 1864 treaty against private FERC licensees would be inappropriate. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985); *Milwaukee v. Illinois*, 451 U.S. at 317. This rule against implied remedies where there already are comprehensive enforcement mechanisms applies fully in federal Indian law. *See, e.g., Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1095-96 (CA9 2005).

Second, many of the Klamath's claims are impermissible collateral attacks on the licensing decisions of the FPC and FERC. The Klamath claim that Copco and its corporate successors "knowingly, recklessly," "intentionally," and "deliberately" violated the 1864 treaty by, *inter alia*, failing to obtain more stringent licensing conditions from the FPC and FERC. FAC ¶¶ 11-12. The Klamath fail to explain why, if the 1864 treaty required "fishway facilities" at Copco No. 1, the FPC and FERC failed to order them, other federal agencies failed to request them from the FPC or FERC, and the Klamath themselves never petitioned for such a licensing condition or modification—or challenged any denial of such a petition in federal court. The Klamath's attempt to state a punitive damages claim against PacifiCorp for its predecessors' failure to insist on more stringent government regulation is precisely the sort of cleverly worded "attempt to restrain the licensing procedures authorized by FERC" that is barred under the FPA. *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 912 (CA9 1989).

Third, FERC decisions are subject to exceedingly strict rehearing and judicial review provisions. Judicial review of a Commission decision may only be obtained as to issues on which the petitioner sought rehearing from the full Commission. 16 U.S.C. § 825*l*(a)-(b). The regional courts of appeals have "exclusive" jurisdiction "to affirm, modify, or set aside" FERC orders on a properly filed petition for review. *Id.* § 825*l*(b); *see City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) ("upon judicial

review of the Commission's order, all objections to the order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all") (emphasis added). "[T]he FPA funnels all challenges" relating to hydroelectric facilities to FERC in the first instance, and for the Klamath to demand tort damages from *PacifiCorp* because the *federal government* did not impose different regulatory terms is precisely the sort of end-run that is jurisdictionally barred. *Yeutter*, 887 F.2d at 912 (tribal challenge was "an assault on an important ingredient of the FERC license"); *see also DiLaura v. Power Auth. of State of New York*, 982 F.2d 73, 79-80 (CA2 1992).[10]

III. EVEN IF THE KLAMATH HAD A CLAIM FOR HISTORIC DAMAGES AGAINST PRIVATE PARTIES, IT IS BARRED BY GOVERNING STATUTES OF LIMITATION.

The Klamath concede that, for them to prevail, "a second issue requires resolution"—whether their claim is barred by governing statutes of limitation. Pet. at 22. They contend, relying on *Oneida II*, that they may pursue a federal common law damage claim free from *any* statutes of limitation or equitable

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[10] There is no cause of action for damages under 16 U.S.C. § 803(c), which merely preserves traditional state-law damage remedies against licensees. *See, e.g., Skokomish*, 410 F.3d at 518-19 (collecting authorities). The Klamath have no such traditional damage remedies against private parties acting pursuant to governmental approvals for all the reasons discussed above. *See* pp. 11-13, 21-23 *supra*. Moreover, damages have never been awarded under § 803(c) for injuries to public natural resources, as opposed to damages for trespass onto private or tribal lands (*e.g.*, through flooding).

restraints. Putting to one side that *Oneida II* dealt only with damage claims against *governments*, not private parties, this argument wholly ignores the quarter-century period (1961-86) during which the Klamath's trust relationship with the federal government was "terminated." As the Magistrate correctly concluded below, this Court's decision in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986)—decided only one Term after *Oneida II*—requires the opposite result here given the quarter-century break in the trust relationship and the running of all conceivable state limitations periods during that period. *See* App. A at 1a-11a.

Catawba's reasoning is squarely on point. The tribe sued South Carolina and other public and private parties, claiming that 225 square miles of the Catawba's treaty-reserved lands had been taken from them in violation of federal law and seeking both injunctive and damages relief. 476 U.S. at 499 n.1, 500 n.4, 505. This Court held that these federal treaty claims were rendered subject to the South Carolina statute of limitations when the federal trust relationship was terminated pursuant to the Catawba Indian Tribe Division of Assets Act, 73 Stat. 592, 25 U.S.C. §§ 931-38. *See* 476 U.S. at 505-11. Because that Act "unmistakably" terminated "special protection for the Tribe" and provided for the application of state laws to the Catawba Tribe and its members "in precisely the same fashion that they apply to others," it logically followed that the Catawba's federal treaty claims became subject to state statutes of limitation upon termination. *Id.* at 507-08.

As the Magistrate found, the Klamath Termination Act contained these same "redefin[ing]" provisions. App. A at 9-a. Section 564q, entitled "Termination of Federal trust," provided that, upon termination, "individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians[.]" It also provided that "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." As the Magistrate emphasized, "[t]he Klamath Act represents clear congressional intent to redefine the relationship between the Tribe, remove the special protections previously afforded the Tribe, and this requires the application of the state statute of limitations to the Tribe's claims." App. A at 9a.

The Klamath argue that *Catawba* did not involve a protection comparable to 25 U.S.C. § 564m(b), which provides that "[n]othing" in the Klamath Termination Act "shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty." They are wrong. *Catawba* rejected a virtually identical claim as the Klamath are making here. "[L]eaders of the Tribe were assured" during the termination process "that any claim they had against the State" for violation of their federal rights "would not be jeopardized by legislation terminating federal services." 476 U.S at 504. The Catawba were assured "that the status of any claim against South Carolina would not be affected by the legislation." *Id.* at 510. This Court rejected the Catawba's argument that a promise not to "jeopardize" or "affect" a claim meant that the claim would never be subject to state statutes of limitation (*id.*):

> Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe thereafter had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. As a result, . . . we perceive no contradiction between the applicability of the state statute of limitations and the assurance that the status of any state claims would not be affected by the Act.

There is no material difference between a promise not to "affect" a claim and one not to "abrogate" it. In either event, the right continues to exist, but the remedies are thereafter governed by the same rules that apply to everyone else.

In addition, subsection 564m(a), which deals with reserved water rights, uses the identical language as subsection 564m(b) ("nothing . . . shall abrogate"), except that subsection (a) goes on to provide that Oregon statutes of repose with respect to "abandonment" and "non-use" of water rights would not apply for the first 15 years following termination. The "nothing . . . shall abrogate" language could not possibly have been meant to bar time-based defenses, because the remainder of subsection (a) would otherwise be superfluous, contrary to governing rules of construction. *See Catawba,* 476 U.S. at 510 & n.22.

The Klamath argue that the Restoration Act "restore[d] the plaintiff's remedy and divest[ed] the defendant of the statutory [limitations] bar," thereby reviving a claim for damages dating back to 1911. Klamath CA9 Br. at 38-39; *see* Pet. at 23-24. That is not what the Act says. It provides for the restoration

of "[a]ll rights and privileges . . . which may have been diminished or lost" as a result of the Termination Act, subject to vested rights and obligations arising out of the operation of that Act. 25 U.S.C. § 566(b), (d). There is an essential distinction between the continued existence of a "right" and the continued existence of a damages "remedy" for the prior violation of that right. The Restoration Act speaks only of the revival of "rights and privileges," not of time-barred "remedies." There is no inconsistency in recognizing the continued existence of the 1864 treaty fishing *right* while concluding that time-barred damage *remedies* against private parties for historic wrongdoing were not "restored" by the revival of the trust relationship between the United States and the Klamath.

This distinction is important, because "extending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action" and "essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 950 (1997). At the very least, Congress must demonstrate its "*clear intent*" to revive time-barred damage claims before such an outcome will be contemplated. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272-73 (1994). This concern has particular force here, where the Klamath are seeking to revive punitive damage claims that expired during the Termination Era. "Retroactive imposition of punitive damages would raise a serious constitutional question." *Id.* at 281. There is simply nothing to suggest that Congress intended in 1986 to revive not only *prospective* "rights and privileges," but damage claims against private parties that became time-

barred during the Termination Era. Although the "guiding philosophy" of earlier periods of Indian law has now been "repudiated," "we must give effect" to reliance interests based on earlier laws. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 357 (1998).[11]

CONCLUSION

For all of the foregoing reasons, the respondent PacifiCorp respectfully submits that the petition for a writ of certiorari should be denied.

Dated this 30th day of June, 2008.

Respectfully submitted,

CHARLES G. CURTIS, JR. *
HELLER EHRMAN LLP
One East Main St.,
Suite 201
Madison, Wisconsin 53703
(608) 663-7460

MICHAEL MIRANDE
1028 32nd Ave. East
Seattle, Washington 98112
(206) 328-8499

JOSEPH H. FAGAN
HELLER EHRMAN LLP
1717 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 912-2162

* *Counsel of Record*

Attorneys for Respondent PacifiCorp

[11] The Klamath have never disputed that Oregon limitations law governs if the Termination Act made state law applicable, and that their damages claim would have run under Oregon law no later than ten years from accrual. *See* App. A at 9a-10a.

APPENDIX

APPENDIX A

Magistrate's Findings and Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 04-644-CO

KLAMATH TRIBES OF OREGON, *et al.*,
Plaintiffs,

v.

PACIFICORP, an Oregon Corporation,
Defendant.

COONEY, *Magistrate Judge:*

Plaintiffs bring this action for damages for the destruction and interference with federal treaty rights to fish for anadromous and non-anadromous fish in the headwaters of the Klamath River. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. Plaintiffs seek compensatory and punitive damages, interest on the damages, costs and attorney's fees. Defendant moves for summary judgment (#36).

I. FACTS

Defendant submits the following statement of facts:

The Klamath Tribes of Oregon, Miller Anderson, Joseph Hobbs, Catherine Weiser-Gonzales, Robert Anderson, Joseph Kirk, Orin Kirk, Leonard Norris, Jr., Philip Tupper, Robert Bojorcas, and Klamath Claims Committee (collectively referred to as the

Klamath or the Tribe) first brought this action on or about May 11, 2004. (Complaint). In 1954, Congress passed the Klamath Termination Act, 25 U.S.C. § 564 *et seq.* The United States terminated federal recognition of the Klamath by 1961. (Bledsoe Decl. Exhibit 1 - First Amended Complaint). The United States restored federal recognition to the Tribe in 1986. (*Id.*). The Klamath allege that harm to its treaty fishing rights was caused by the construction of Copco 1 Dam during the period 1911-1916, of Link River Dam and associated work on the nearby reef in the early 1920s, and Keno Dam in 1967.

Plaintiffs submit the following additional facts:

At the time of the Klamath Indian treaty with the United States and for many decades thereafter, anadromous fish could be found and were taken by the Klamath Indians in the Williamson and Sprague Rivers, and possibly in the Wood River System, at the upper end of the Klamath Basin. (Dunsmoor Affidavit). Anadromous fish could be restored over time to the Williamson, Sprague and Wood River sub-basins if the Pacificorp project dams were removed or if adequate upstream and downstream fish passage was provided. (*Id.*).

II. LEGAL STANDARDS

Pursuant to Rule 56 subsection c of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56 subsection c; *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). In deciding a

motion for summary judgment, the court must determine, based on the evidence of record, whether there is any material dispute of fact that requires a trial. *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (citations omitted). The parties bear the burden of identifying the evidence that will facilitate the court's assessment. *Id.*

The moving party bears the initial burden of proof. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995). The moving party meets this burden by identifying portions of the record on file which demonstrates the absence of any genuine issue of material fact. *Id.* "[T]he moving party . . . need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case." *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 393 (4th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995) (citation omitted).

In assessing whether a party has met their burden, the court must view the evidence in the light most favorable to the nonmoving party. *Allen v. City of Los Angeles*, 66 F.3d 1052 (9th Cir. 1995). All reasonable inferences are drawn in favor of the nonmovant. *Id.*

If the moving party meets their burden, the burden shifts to the opposing party to present specific facts which show there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Auvil v. CBS "60 Minutes"*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996). The nonmoving party cannot carry their burden by relying solely on the facts alleged in their pleadings. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1994). Instead, their response, by affidavits or as otherwise provided in Rule 56, must designate

specific facts showing there is a genuine issue for trial. *Id.*

III. DISCUSSION

Defendant moves for summary judgment arguing that, under *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986), the Klamath Termination Act made the state's statutes of limitations applicable to the Tribe's claims in 1961, and that the potentially applicable state statutes of limitations have run, barring the Tribe's claims. In response, plaintiffs argue that the rule in *Catawba Indian Tribe* does not apply to the treaty fishing rights at issue in this litigation, and, in the alternative, if the statutes of limitations apply, the Tribe has a cause of action for a continuing trespass under Oregon law. In reply, defendant argues that *Catawba Indian Tribe* applies to this case, and Oregon Courts have rejected the Tribe's continuing tort theory.

In *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 500 (1986), the Supreme Court, in interpreting the statute authorizing the division of Catawba Tribal assets, 25 U.S.C. §§ 931-938, held that the State's statute of limitations applied to a claim brought by the Catawba Tribe for possession of a 225 square mile tract of land held by the tribe prior to the passage of the Non-Intercourse Act. Section 5 of the Catawba Act provided that:

> The constitution of the tribe adopted pursuant to sections 461, 462, 463, 464, 465, 466, to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any special services performed by the United States for

> Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction

Id. at 505 (citing 25 U.S.C. § 935).

In interpreting this provision and finding that the state's statute of limitations applied to the claim, the Supreme Court stated, in relevant part that:

> This provision establishes two principles in unmistakably clear language. First, the special federal services and statutory protections for Indians are no longer applicable to the Catawba Tribe and its members. Second, state laws apply to the Catawba Tribes and its members in precisely the same fashion that they apply to others.
>
> * * * *
>
> The canon of construction regarding the resolution of ambiguities in favor of the Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress. . . .
>
> * * * *
>
> Without special federal protection for the Tribe, the state statute of limitations should apply to its claim in this case. For it is well established the federal claims are subject to state statutes of limitations unless there is a federal statute of limitations or a conflict

with federal policy. Although federal policy may preclude the ordinary applicability of a state statute of limitations for this type of action in the absence of a specific congressional enactment to the contrary, *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 105 S.Ct. 1242, 84 L.Ed.2d 169 (1985), the Catawba Act clearly suffices to reestablish the usual principle regarding the applicability of the state statute of limitations. In striking contrast to the situation in *County of Oneida,* the Catawba Act represents an explicit redefinition of the relationship between the Federal Government and the Catawbas; an intentional termination of the special federal protection for the Tribe and its members; and a plain statement that state law applies to the Catawbas as to all 'other persons or citizens.'

That the state statute of limitations applies as a consequence of terminating special federal protections is also supported by the significance we have accorded congressional action redefining the federal relationship with particular Indians. We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claims. Similarly, we have emphasized that Termination Acts subject members of the terminated tribe to 'the full sweep of state laws and state taxation.' These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the

> Indians who are the subject of the particular legislation.
>
> * * * *
>
> . . . We do not accept petitioners' argument that the Catawba Act immediately extinguished any claim that the Tribe had before the statute became effective. Rather, we assume that the status of the claim remained exactly the same immediately before and immediately after the effective date of the Act, but that the Tribe there-after had an obligation to proceed to assert its claim in a timely manner as would any other person or citizen within the State's jurisdiction. . . .
>
> * * * *
>
> We thus conclude that the explicit redefinition of the federal relationship reflected in the clear language of the Catawba Act requires the application of the state statute of limitations to the Tribe's claim.

Id. at 505-511 (footnotes omitted).

In 1954, Congress passed the Klamath Termination Act, 25 U.S.C. § 564 *et seq.* (The Klamath Act). The provision of the Klamath Act terminating the federal trust relationship with the Tribe provides that:

> Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members

> of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this subchapter, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

25 U.S.C. § 564q.

The Klamath Act also contains the following provisions regarding water and fishing rights:

> (a) Water rights; laws applicable to abandonment
>
> Nothing in this subchapter shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 564q of this title.
>
> (b) Fishing rights or privileges
>
> Nothing in this subchapter shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

25 U.S.C. § 564m.

This court finds that the reasoning set forth by the Supreme Court in *Catawba Tribes* is applicable to

this case and that Oregon's statutes of limitations apply to the Klamath tribe's claims. The Klamath Act contains the same language as the Catawba Act. The Klamath Act had the same effect; the Tribe's special relationship with the Federal Government ended and any claims by the Tribe or its members became subject to state statute of limitations. *See Catawba Tribes,* 476 U.S. at 507-508. The Klamath Act represents clear congressional intent to redefine the relationship between the Tribe, remove the special protections previously afforded the Tribe, and this requires the application of the state statute of limitations to the Tribe's claims. *See Id.* at 510-511.

Plaintiffs argue that this court should apply the principles set forth in *Menominee Tribe of Indians v. U.S.,* 391 U.S. 404 (1968), *U.S. v. Adair,* 723 F.2d 1394 (9th Cir.), *cert. denied,* 467 U.S. 1252 (1984), *Kimball v. Callahan,* 590 F.2d 768 (9th Cir.), *cert. denied,* 444 U.S. 826 (1979) (Kimball II), and *Kimball v. Callahan,* 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974) (Kimball I) and find that the state statue of limitations is not applicable to their claims to enforce their treaty fishing rights. The court finds that these cases did not address the issue of whether the state statute of limitations applies to claim for damages brought by the Tribe or its members, and, therefore, these cases are inapplicable.

As the defendant points out, there are three Oregon statutes of limitations that may be applicable to the tribe's claims; ORS 12.080 which provides a six year limitations period for actions based upon a contract or a statute or for interference with certain interests in real property, ORS 12.110 which provides a two year limitations period for claims based on injury to persons or rights not arising under a contract and not

specifically enumerated in ORS Chapter 12, or ORS 12.140 which provides a ten year limitations period for any cause of action not otherwise provided for. Under Oregon law, when a continuing tort is causing on going injury, a cause of action accrues and the statute of limitations begins to run when the trespass or interference begins. *Denora v. Fischer Engineering & Maintenance Co., Inc.*, 55 Or. App. 448, 450 (1982).

The undisputed facts show that the dams at issue, which plaintiffs claim have caused damage to and interfered with their fishing rights, were built in 1916, the 1920's, and 1967. Any cause of action based on damage from these dams accrued when the dams were built. However, because of the Tribe's special relationship with the Federal Government, the state statute of limitations did not apply to any claims by the Tribe or individual tribe members, until the Klamath Termination Act became effective in 1961. Under the longest applicable statue of limitations, ORS 12.140, the statue of limitations ran on plaintiff's claims in 1971. This action was not filed in May 2004. Therefore, it is barred by the statute of limitations.

IV. RECOMMENDATION

Based on the foregoing, it is recommended that defendant's motion for summary judgment (#36) be granted and this case be dismissed.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. *The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections*

with the Court. Thereafter, the parties have ten days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 14 day of April, 2005.

/s/

UNITED STATES MAGISTRATE JUDGE

APPENDIX B

Treaty of October 14, 1864, 16 Stat. 707

Treaty between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians; Concluded, October 14, 1864; *Ratification advised with Amendments, July* 2, 1866; *Amendments assented to, December* 10, 1869; *Proclaimed, February* 17, 1870.

ULYSSES S. GRANT,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Klamath lake, in the State of Oregon, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, by and between J. W. Perit Huntington and William Logan, commissioners on the part of the United States, and La-Lake, Chil-o-que-nas, and other chiefs and headmen of the Klamath tribe of Indians; Schon-chin, Stak-it-ut, and other chiefs and headmen of the Moadoc tribe of Indians, and Kile-to-ak and Sky-te-ock-et, chiefs and headmen of the Yahooskin band of Snake Indians, respectively, on the part of said tribes and band of Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at Klamath lake, Oregon, on the fourteenth day of October, A.D. one thousand eight

hundred and sixty-four, by J. W. Perit Huntington, superintendent of Indian affairs in Oregon, and William Logan, United States Indian agent for Oregon, on the part of the United States, and the chiefs and headmen of the Klamath and Moadoc tribes, and Yahooskin band of Snake Indians, hereinafter named, to wit: La-Lake, Chil-o-que-nas, Kellogue, Mo-ghen-kas-kit, Blow, Le-lu, Palmer, Jack, Queas, Poo-sak-sult, Che-mult, No-ak-sum, Mooch-kat-allick, Toon-tuck-te, Boos-ki-you, Ski-a-tic, Shol-las-loos, Ta-tet-pas, Muk-has, Herman-koos-mam, chiefs and headmen of the Klamath, Schon-chin, Stak-it-ut, Keint-poos, Chuck-e-i-ox, chiefs and headmen of the Moadocs, and Kile-to-ak and Sky-te-ock-et, chiefs of the Yahooskin band of Snakes.

ARTICLE I. The tribes of Indians aforesaid cede to the United States all their right, title, and claim to all the country claimed by them, the same being determined by the following boundaries, to wit: Beginning at the point where the forty-fourth parallel of north latitude crosses the summit of the Cascade mountains; thence following the main dividing ridge of said mountains in a southerly direction to the ridge which separates the waters of Pitt and McCloud rivers from the waters on the north; thence along said diving ridge in an easterly direction to the southern end of Goose lake; thence northeasterly to the northern end of Harney lake ; thence due north to the forty-fourth parallel of north latitude; thence west to the place of beginning: *Provided*, That the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States, be set apart as a residence for said Indians, [and] held and regarded as an Indian reservation, to wit; Beginning upon the

eastern shore of the middle Klamath lake, at the Point of Rocks, about twelve miles below the mouth of Williamson's river; thence following up said eastern shore to the mouth of Wood river; thence up Wood river to a point one mile north of the bridge at Fort Klamath; thence due east to the summit of the ridge which divides the upper and middle Klamath lakes; thence along said ridge to a point due east of the north end of the upper lake; thence due east, passing the said north end of the upper lake, to the summit of the mountains on the east side of the lake; thence along said mountain to the point where Sprague's river is intersected by the Ish-tish-ea-wax creek; thence in a southerly direction to the summit of the mountain, the extremity of which forms the Point of Rocks; thence along said mountain to the place of beginning. And the tribes aforesaid agree and bind themselves that, immediately after the ratification of this treaty, they will remove to said reservation and remain thereon, unless temporary leave of absence be granted to them by the superintendent or agent having charge of the tribes.

It is further stipulated and agreed that no white person shall be permitted to locate or remain upon the reservation, except the Indian superintendent and agent, employes of the Indian department, and officers of the army of the United States, *guaranteed* [and] that in case persons other than those specified are found upon the reservation, they shall be immediately expelled therefrom; and the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and barriers within its limits, is hereby secured to the Indians aforesaid: *Provided, also*, That the right of way for public roads and railroads across

said reservation is *guaranteed* [reserved] to citizens of the United States.

ARTICLE II. In consideration of and in payment for the country ceded by this treaty, the Unites States agree to pay to the tribes conveying the same the several sums of money hereinafter enumerated, to wit; Eight thousand dollars per annum for a period of five years, commencing on the first day of October, eighteen hundred and sixty-five, or as soon thereafter as this treaty may be ratified; five thousand dollars per annum for the term of five years next succeeding the first period of five years; and three thousand dollars per annum for the term of five years next succeeding the second period; all of which several sums shall be applied to the use and benefit of said Indians by the superintendent or agent having charge of the tribes, under the direction of the President of the Unites States, who shall, from time to time, in his discretion, determine for what objects the same shall be expended, so as to carry out the design of the expenditure, [it] being to promote the well being of the Indians, advance them in civilization, and especially agriculture, and to secure their moral improvement and education.

ARTICLE III. The United States agree to pay said Indians the additional sum of thirty-five thousand dollars, a portion whereof shall be used to pay for such articles as may be advanced to them at the time of signing this treaty, and the remainder shall be applied to subsisting the Indians during the first year after their removal to the reservation, the purchase of teams, farming implements, tools, seeds, clothing, and provisions, and for payment of the necessary employes.

ARTICLE IV. The Unites States further agree that there shall be erected at suitable points on the reservation, as soon as practicable after the ratification of this treaty, one saw-mill, one flouring-mill, suitable buildings for the use of the blacksmith, carpenter, and wagon and plough maker, the necessary buildings for one manual-labor school, and such hospital buildings as may be necessary, which buildings shall be kept in repair at the expense of the United States for the term of twenty years; and it is further stipulated that the necessary tools and material for the saw-mill, flour-mill, carpenter, blacksmith, and wagon and plough maker's shops, and books and stationery for the manual-labor school, shall be furnished by the United States for the period of twenty years.

ARTICLE V. The United States further engage to furnish and pay for the services and subsistence, for the term of fifteen years, of one superintendent of farming operations, one farmer, one blacksmith, one sawyer, one carpenter, and one wagon and plough maker, and for the term of twenty years of one physician, one miller, and two school-teachers.

ARTICLE VI. The United States may, in their discretion, cause a part or the whole of the reservation provided for in Article I, to be surveyed into tracts and assigned to members of the tribes of Indians, parties to this treaty, or such of them as may appear likely to be benefited by the same, under the following restrictions and limitations, to wit: To each head of a family shall be assigned and granted a tract of not less than forty nor more than one hundred and twenty acres, according to the number of persons in such family; and to each single man above the age of twenty-one years a tract not exceeding forty acres.

The Indians to whom these tracts are granted are guaranteed the perpetual possession and use of the tracts thus granted and of the improvements which may be placed thereon; but no Indian shall have the right to alienate or convey any such tract to any person whatsoever, and the same shall be forever exempt from levy, sale, or forfeiture: *Provided*, That the Congress of the United States may hereafter abolish these restrictions and permit the sale of the lands so assigned, if the prosperity of the Indians will be advanced thereby: *And provided further*, If any Indian, to whom an assignment of land has been made, shall refuse to reside upon the tract so assigned for a period of two years, his right to the same shall be deemed forfeited.

ARTICLE VII. The President of the United States is empowered to declare such rules and regulations as will secure to the family, in case of the death of the head thereof, the use and possession of the tract assigned to him, with the improvements thereon.

ARTICLE VIII. The annuities of the tribes mentioned in this treaty shall not be held liable or taken to pay the debts of individuals.

ARTICLE IX. The several tribes of Indians, parties to this treaty, acknowledge their dependence upon the government of the United States, and agree to be friendly with all citizens thereof, and to commit no depredations upon the person or property of said citizens, and to refrain from carrying on any war upon other Indian tribes; and they further agree that they will not communicate with or assist any persons or nation hostile to the United States, and, further, that they will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct.

ARTICLE X. It is hereby provided that if any member of these tribes shall drink any spirituous liquor, or bring any such liquor upon the reservation, his or her proportion of the benefits of this treaty may be withheld for such time as the President of the United States may direct.

ARTICLE XI. It is agreed between the contracting parties that if the United States, at any future time, may desire to locate other tribes upon the reservation provided for in this treaty, no objection shall be made thereto; but the tribes, parties to this treaty, shall not, by such location of other tribes, forfeit any of their rights or privileges guaranteed to them by this treaty.

ARTICLE XII. This treaty shall bind the contracting parties whenever the same is ratified by the Senate and President of the United States.

In witness of which, the several parties named in the foregoing treaty have hereunto set their hands and seals at the place and date above written.

J. W. PERIT HUNTINGTON, [SEAL.]
Supt. Indian Affairs.

WILLIAM LOGAN, [SEAL.]
U. S. Indian Agt.

LA-LAKE,	his x mark.[SEAL.]
CHIL-O-QUE-NAS,	his x mark.[SEAL.]
KELLOGUE,	his x mark.[SEAL.]
MO-GHEN-KAS-KIT,	his x mark.[SEAL.]
BLOW,	his x mark.[SEAL.]
LE-LU,	his x mark.[SEAL.]
PALMER,	his x mark.[SEAL.]
JACK,	his x mark.[SEAL.]
QUE-ASS,	his x mark.[SEAL.]

POO-SAK-SULT,	his x mark.[SEAL.]
CHE-MULT,	his x mark.[SEAL.]
NO-AK-SUM,	his x mark.[SEAL.]
MOOCH-KAT-ALLICK,	his x mark.[SEAL.]
TOON-TUC-TEE,	his x mark.[SEAL.]
BOSS-KI-YOU,	his x mark.[SEAL.]
SKI-AT-TIC,	his x mark.[SEAL.]
SHOL-LAL-LOOS,	his x mark.[SEAL.]
TAT-TET-PAS,	his x mark.[SEAL.]
MUK-HAS,	his x mark.[SEAL.]
HERMAN-KUS-MAM,	his x mark.[SEAL.]
JACKSON,	his x mark.[SEAL.]
SCHON-CHIN,	his x mark.[SEAL.]
STAK-IT-UT,	his x mark.[SEAL.]
KEINT-POOS,	his x mark.[SEAL.]
CHUCK-E-I-OX,	his x mark.[SEAL.]
KILE-TO-AK,	his x mark.[SEAL.]
SKY-TE-OCK-ET,	his x mark.[SEAL.]

Signed in the presence of—
R. P. EARHART, *Secretary.*
WM. KELLY,
Capt. 1st Car., Oregon Volunteers.
JAMES HALLORAN,
2d Lieut. 1st Inf., W. T. Vols.
WILLIAM C. MCKAY, *M.D.*
his
ROBERT M. BIDDLE.
mark.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of July, one thousand eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES

July 2, 1866.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded at Klamath lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and Yahooskin band of Snake Indians, with the following

AMENDMENTS:

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and.*

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved.*

Attest: J.W. FORNEY,
Secretary.

And whereas, the foregoing amendments having been fully explained and interpreted to the chiefs and headmen of the aforementioned Klamath and Moadoc tribes and Yahooskin band of Snake Indians, whose names are hereinafter signed, they did, on the tenth day of December, one thousand eight hundred and sixty-nine, give their free and voluntary assent to the said amendments, in the words and figures following, to wit:

Whereas the Senate of the United States, in executive session, did, on the second day of July, A. D. 1866, advise and consent to the ratification of the articles of agreement and convention made and concluded at

Klamath lake, Oregon, on the 14th of October, 1864, by the commissioners on the part of the United States and the Klamath and Moadoc tribes and the Yahooskin band of Snake Indians, with the following amendments:—

1st. Article 1, paragraph 2, line 3, strike out the word "guaranteed," and insert in lieu thereof the word *and*.

2d. Same article, same paragraph, line 7, strike out the word "guaranteed," and insert in lieu thereof the word *reserved*.

And whereas the foregoing amendments have been fully interpreted and explained to the undersigned chiefs and headmen of the aforesaid Klamath and Moadoc tribes and Yahooskin band of Snake Indians, we do hereby agree and assent to the same.

Done at Klamath Agency, Oregon, on this tenth day of December, A. D. 1869.

In witness of which, the several parties named in the said treaty have hereunto set their hands and seals, at the place and date above written.

A. B. MEACHAM, [SEAL.]
Supt. Ind. Affairs.
O. C. KNAPP, [SEAL.]
U. S. Ind. Agent.

ALLAN DAVIE, his x mark. [SEAL.]
signed as BOSS KIYOU,
LE-LAKE, his x mark. [SEAL.]
CHIL-O-QUE-NOS, his x mark. [SEAL.]
MO-GHEN-KAS-KIT, his x mark. [SEAL.]
BLOW, his x mark. [SEAL.]
LE-LU, his x mark. [SEAL.]
PALMER, his x mark. [SEAL.]

JACK,	his x mark.[SEAL.]
QUE-ALL,	his x mark.[SEAL.]
POO-SAK,	his x mark.[SEAL.]
CHE-MULT,	his x mark.[SEAL.]
NO-AK-SUM,	his x mark.[SEAL.]
MOOCH-KAT-ALLICK,	his x mark.[SEAL.]
TOON-TUC-TE,	his x mark.[SEAL.]
SHOL-LAL-LOOS,	his x mark.[SEAL.]
TAT-TET-POS,	his x mark.[SEAL.]
MUK-HAS,	his x mark.[SEAL.]
HERMAN-KUS-MAN,	his x mark.[SEAL.]
JACKSON,	his x mark.[SEAL.]
SCHON-CHIN,	his x mark.[SEAL.]
KILE-TO-AK,	his x mark.[SEAL.]
STA K-IT-UT,	his x mark.[SEAL.]
KEINT-POOS,	his x mark.[SEAL.]

Signed in the presence of—
WM. C. MCKAY, *Secretary.*
J. D. APPLEGATE.
JNO. MEACHAM.

Now, therefore, be it known that I, ULYSSES S. GRANT, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the second of July, one thousand eight hundred and sixty-six, accept, ratify, and confirm the said treaty, with the amendments as aforesaid.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington this seventeenth day of February, in the year of our Lord one thousand

eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

[SEAL.] U. S. GRANT

By the President:
HAMILTON FISH,
Secretary of State.

APPENDIX C

Excerpts from the Klamath Termination Act of 1954,

ch. 732, 68 Stat. 718
(codified as amended at 25 U.S.C. §§ 564 *et seq.*)

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§ 564. Purpose

The purpose of this Act is to provide for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians consisting of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians, and of the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of said Indians, and for a termination of Federal services furnished such Indians because of their status as Indians.

* * * *

§ 564m. Water and fishing rights

(a) Water rights; laws applicable to abandonment. Nothing in this Act shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to the abandonment of water rights by non-use shall not apply to the tribe and its members until fifteen years after the date of the proclamation issued pursuant to section 18 of this Act [25 U.S.C. § 564q].

(b) Fishing rights or privileges. Nothing in this Act shall abrogate any fishing rights or privileges of the tribe or the members thereof enjoyed under Federal treaty.

* * * *

§ 564q. Termination of Federal trust

(a) Publication; termination of Federal services; application of Federal and State laws. Upon removal of Federal restrictions on the property of the tribe and individual members thereof, the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians and, except as otherwise provided in this Act, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

(b) Citizenship status unaffected. Nothing in this Act shall affect the status of the members of the tribe as citizens of the United States.

* * * *

§ 564r. Termination of Federal power over tribe

Effective on the date of the proclamation provided for in section 18 of this Act [25 U.S.C. § 564q], all powers of the Secretary or other officer of the United States to take, review, or approve any action under the constitution and bylaws of the tribe are hereby terminated. Any powers conferred upon the tribe by such constitution which are inconsistent with the provisions of this Act are hereby terminated. Such termination shall not affect the power of the tribe to take any action under its constitution and bylaws

that is consistent with this Act without the participation of the Secretary or other officer of the United States.

APPENDIX D

Excerpts from the Klamath Indian Tribe Restoration Act,

Pub. L. No. 99-398, 100 Stat. 849
(codified as amended at 25 U.S.C. §§ 566 *et seq.*)

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§ 566. Restoration of Federal recognition, rights, and privileges

(a) Federal recognition. Notwithstanding any provision of law, Federal recognition is hereby extended to the tribe and to members of the tribe. Except as otherwise provided in this Act, all laws and regulations of the United States of general application to Indians or nations, tribes, or bands of Indians which are not inconsistent with any specific provision of this Act shall be applicable to the tribe and its members.

(b) Restoration of rights and privileges. All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the Act entitled "An Act to provide for the termination of Federal supervision over the property of the Klamath Tribe of Indians located in the State of Oregon and the individual members thereof, and for other purposes", approved August 13, 1954 (25 U.S.C. §§ 564 *et seq.*), are restored, and the provisions of such Act, to the extent that they are inconsistent with this Act, shall be inapplicable to the tribe and to members of the tribe after the date of the enactment of this Act [enacted Aug. 27, 1986].

(c) Federal services and benefits. Notwithstanding any other provision of law, the tribe and its members

shall be eligible, on and after the date of the enactment of this Act, for all Federal services and benefits furnished to federally recognized Indian tribes or their members without regard to the existence of a reservation for the tribe. In the case of Federal services available to members of federally recognized Indian tribes residing on or near a reservation, members of the tribe residing in Klamath County shall be deemed to be residing in or near a reservation. Any member residing in Klamath County shall continue to be eligible to receive any such Federal service notwithstanding the establishment of a reservation for the tribe in the future. Notwithstanding any other provision of law, the tribe shall be considered an Indian tribe for the purpose of the "Indian Tribal Government Tax Status Act" (Sec. 7871, I.R.C. 1954).

(d) Certain rights not altered. Nothing in this Act shall alter any property right or obligation, any contractual right or obligation, or any obligation for taxes already levied.

APPENDIX E

1917 Cal. Stats. ch. 749, § 1
(codified as amended at Cal. Water Code § 5938)

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§ 5938. Hatchery in lieu of fishway; operation by department

Whenever in the opinion of the [California Fish and Game Commission] it is impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, the commission may, in lieu of the fishway, order the owner of the dam completely to equip, within a specified time, on a site to be selected by the department, a hatchery, together with swellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. After such hatchery has been constructed, the department shall operate it without further expense to the owner of the dam except as provided in Sections 5950 and 5941.

APPENDIX F

Excerpts from the Federal Water Power Act of 1920,

ch. 285, 41 Stat. 1063

(codified as amended at 16 U.S.C. §§ 791a *et seq.*)

§ 811. Operation of navigation facilities; rules and regulations; penalties

The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce [or the Secretary of the Interior, as appropriate]. The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of the date of enactment of the Energy Policy Act of 2005 [enacted Aug. 8, 2005], the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission. The operation of any navigation facilities which may

be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War [Secretary of the Army]; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof [16 U.S.C. § 825o].

* * * *

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order. Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought

by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Judicial review. Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [United States Court of Appeals] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the

application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [28 U.S.C. § 1254].

(c) Stay of Commission's order. The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

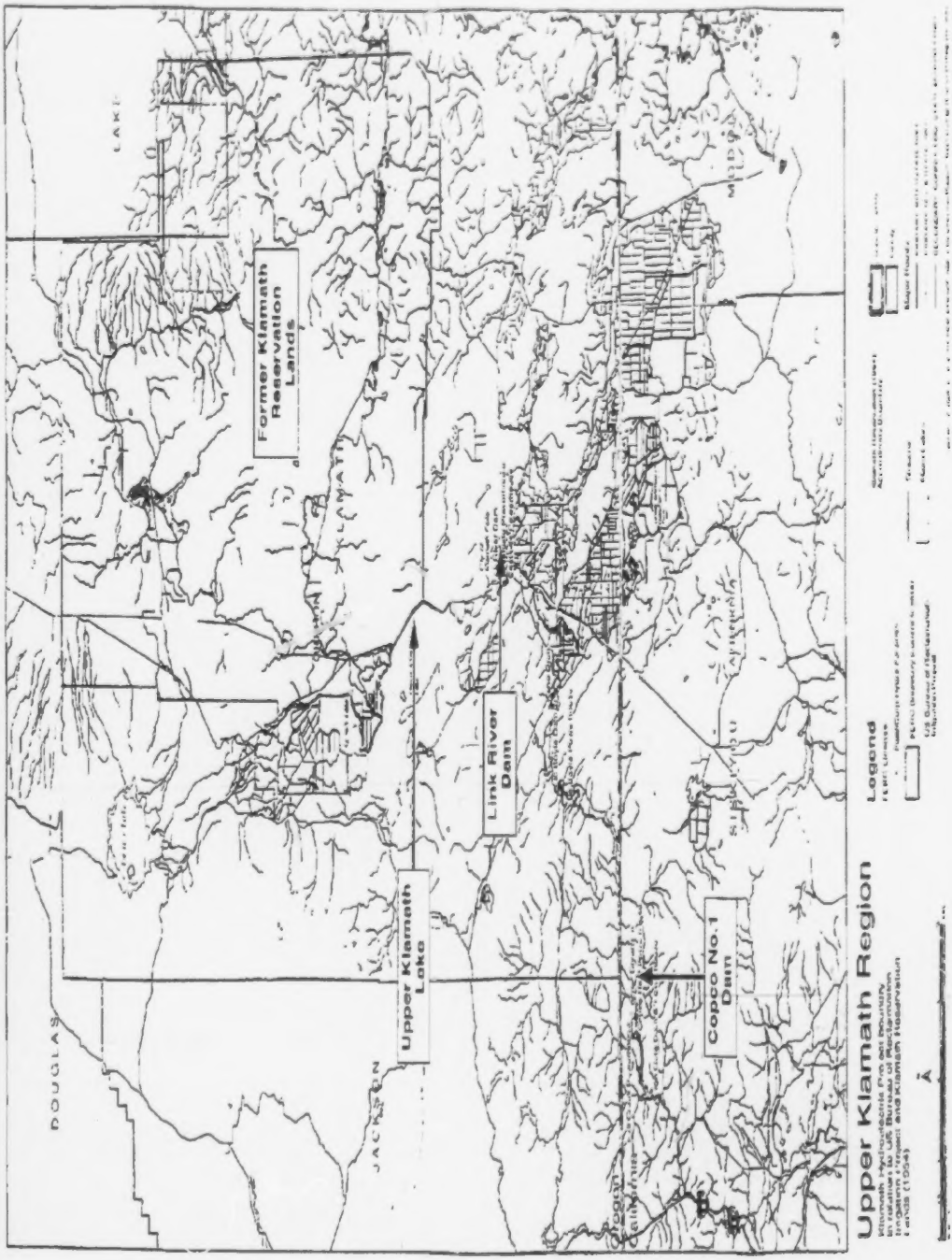
APPENDIX G

Excerpt from the Federal Power Commission's License for Klamath Hydroelectric Project No. 2082

As amended, 25 FPC 579, 581 (1961)

Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

APPENDIX H



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